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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
**ECCLESIASTICAL COURTS**  
AT  
**Doctors' Commons,**  
AND IN THE  
HIGH COURT OF DELEGATES.

---

BY J. ADDAMS, LL. D.

AN ADVOCATE IN DOCTORS' COMMONS.

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*Ante omnia, Judicia reddita in curiis supremis et principalibus, atque causis gravioribus, præsertim dubiis, quæque aliquid habent difficultatis aut novitatis, diligenter et cum fide excipiunt. Modus hujus modi judicia excipiendi, et in scripta referendi, talis esto. Casus præcise, judicia ipsa exacte, perscribito: rationes judiciorum, quas adduxerunt judices, adjicito: de advocatorum perorationibus sileto.*

BACON DE AUGM. SCIENT. in lib. viii. c. 3.

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VOL. II.

CONTAINING CASES FROM MICHAELMAS TERM, 1823,

TO TRINITY TERM, 1825, INCLUSIVE,

IN CONTINUATION OF

THE ECCLESIASTICAL REPORTS OF DR. PHILLIMORE.

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LONDON:

S. SWEET, LAW BOOKSELLER AND PUBLISHER, CHANCERY LANE,  
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III

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ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

**Doctors' Commons;**

AND IN THE

HIGH COURT OF DELEGATES.

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ARCHES COURT OF CANTERBURY.

---

STREET v. STREET.

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*(An Appeal from the Consistorial Episcopal Court  
of Exeter.)*

1823.  
*Michaelmas*  
*Term.*  
2d Session.

**THIS** was an appeal by the husband from an allotment of permanent alimony to the wife, made by the Consistorial Episcopal Court of Exeter; where the wife had obtained a sentence of divorce from the husband by reason of adultery.

## JUDGMENT.

**Sir JOHN NICHOLL.**

In this suit, which was originally depending in the Consistory Court of the Lord Bishop of Exeter, the wife, the respondent, has obtained a sentence of divorce from the husband, the appellant, by reason of adultery. The appellant acquiesces in the sentence so far. But the wife has also been allotted the sum of 160*l.* per annum, payable by the husband as for per-

Sentences of local ordinaries as to the amount of (especially permanent) alimony, not to be disturbed on slight grounds. An appeal by the husband, complaining that too large a sum had been allotted to the wife for permanent alimony pronounced against, and the cause remitted.

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manent alimony. It is this allotment of alimony which the husband objects to; and from which he has prosecuted the present appeal.

I am still of opinion, as in the case of Cook and Cook (*a*) to which I have been referred, that it requires a strong case to disturb the sentence of the local ordinary upon a question of alimony. If that sentence were extreme either way, the Court would, undoubtedly, interfere; in the one case to modify or reduce, and in the other to augment, the alimony, so, in either case, on that supposition, egregiously misallotted. But it is not any mere slight difference of opinion as to the propriety of the allotment in point of amount, which would justify this Court to itself in exercising such an interference; and for this reason, in particular. The Court below must have been better informed than this Court can be, with respect to the real merits of the whole case, as between the parties. It had better means, consequently, of forming its judgment upon the question, agreeably to those general principles of equity which are nearly the only ones capable of being brought to bear upon this species of question. For instance, the Court below had means of estimating the true nature and degree of the husband's delinquency; with respect to which this Court is, comparatively, uninformed; for the "*process*" only includes that part of the whole case connected with the subject-matter of the appeal, in particular.

The appellant, in his answers to the allegation of faculties admitted an income of 50*l.* 16*s.*: and, without suspecting him of perjury, I am justified

(*a*) 2 Phillimore, page 40.

in thinking him inclined to make the best, in those answers, of his own case; more especially from a circumstance to which I will presently advert. Now taking this amount of income at his own statement, I am of opinion, that the allotment of alimony complained of is, by no means, exorbitant. Not that the Court below was not well founded in rating, as it probably did, the appellant's income something higher than he admitted it. For instance, in his answer to the 4th article of the allegation of faculties, he estimated the profits of his business, that of a coachmaker, at 250*l.* per annum; and that, without exhibiting his books, or producing any sort of vouchers. But of two witnesses upon the allegation of faculties, who should seem to be competent judges, one is of opinion, that "the appellant's business nets between 3 and 400*l.*" and the other, that "he does not clear by it more than 500*l.* per annum." And there was a circumstance in the case, as already hinted, which fully justified the Court in concluding that the appellant would go, at least, the utmost warrantable length, for the advancement or maintenance of his own interest. The appellant had sworn in his answers that the respondent was possessed, in her own right, of certain premises, which he, the appellant, was ready and willing to take, for a term of years, at a net rent of 30*l.* But it was in proof, that on the respondent offering to close with this proposal of the appellant, he not only refused to take the premises in question at a net annual rent of 30*l.*, but said, that "he would have nothing to do with them, at any price." Lastly, these premises themselves were sworn by a builder and surveyor not to be worth more than 16*l.* 5*s.* per annum, net

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rent. And upon this evidence the Court which had given credence, in the first instance, to the husband's statement, in allotting the alimony, *pendente lite*, afterwards directed the additional sum of 1*l.* 2*s.* 6*d.* per month to be paid to the wife: being the monthly difference between the real value of these premises so ascertained, and that sworn to by the husband; at which the Court, as I have said, had been content to take them, in allotting the alimony, *pendente lite*, at the commencement of the suit.

But taking the husband's statement as correct, what is the result? The joint income of the parties is 527*l.* per annum, the wife appearing to be possessed of a separate income of 25*l.* per annum, in her own right. Add to this, the annual sum of 160*l.* payable to the wife by the husband under the sentence appealed from; and the wife's annual income is 185*l.* leaving that of the husband 342*l.*, nearly double that of the wife. She has rather more than two-fifths of the whole; no unusual proportion, for courts have, not unfrequently, given a moiety, and surely not an excessive proportion in a case like the present. For the husband, in this case, had, originally, no property. He *seems*, at least, to be indebted for all his prosperity to this marriage (a) from the obligations of which he

(a) It was in evidence for the respondent, that Street the appellant was an apprentice to his wife's first husband, and that he had no property at the time he married her. On the other hand, however, it was sworn by the appellant, that the wife's whole property at the time of the marriage, had been settled upon her, to her own separate use, that her business, at the time of the marriage, produced very little profit, and that its afterwards becoming more profitable was solely owing to his industry and perseverance.



has broken, and the duties of which he has neglected to fulfil.

But the parties have one child, a daughter, and it appears in the process, by the appellant's answers to the allegation of faculties, that he pays for the education and maintenance of this daughter (pursuant to a stamped agreement) the sum of 200*l.* per annum, which, "under the degrading circumstances of her late situation, cannot be less:" and the appellant claims that his income of 502*l.* shall be taken, less the sum of 200*l.* per annum, which he so pays for this daughter's maintenance and education. Of what these "degrading circumstances" alluded to in the process are, this Court is, judicially, uninformed (*a*); but the local ordinary, though probably better, in fact, acquainted with them, declined acceding to the husband's prayer in this behalf. It is quite impossible for this Court, uninformed as it is on the subject, to pronounce that, in so doing, he acted erroneously. It is equally so to maintain, that, independent of this, or upon general considerations, the father's improvident bargain with respect to the child, can operate, any way, to the prejudice of the mother. Upon the whole, nothing before the Court enables it to pronounce that the sentence appealed from was founded upon a view of the case at all erroneous; under which impression it is the duty of the Court to affirm it, and to remit the cause.

Sentence affirmed.

(*a*) At the hearing, *affidavits* were tendered on the part of the appellant, stating that his daughter, at the age of 15, had eloped from Exeter with a strolling player, at the mother's instigation, &c. &c. But the counsel for the respondent objected to the admission of these *affidavits*, and the Court sustained their objection, and refused to permit the *affidavits* to be read.

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4th Session.

## IN THE PREROGATIVE COURT OF CANTERBURY.

## CURLING v. THORNTON.

(In the Goods of the late Colonel Thornton.)

An allegation, responsive to a *condidit*—suggesting the will of a British-born subject to be invalid by the law of France; where he died, and of which country he was alleged to have died a “domiciled inhabitant”; and that the effect of that invalidity was to defeat its claim to probate in the courts of this country—*rejected*.

**THOMAS THORNTON**, Esq. the party deceased in this cause, died at Paris, in the month of March, 1823. Probate of his will being opposed on behalf of his widow and relict, it was propounded, by his executor, in a common *condidit*. The present question arose, on the admission of an allegation, tendered by the widow, responsive to that plea.

This allegation pleaded, in substance,


1. *That* the said Thomas Thornton went from England to France, about the end of the year 1815, and for a considerable time resided in that kingdom—*that* having determined to settle there, he arranged all his affairs in this country, “so far as was necessary or practicable,” and towards the end of the year 1816, finally withdrew therefrom, as a permanent place of abode, and fixed his place of residence at Paris—*that*, in pursuance of such determination, and in order to acquire civil rights as a domiciled inhabitant of that kingdom, he applied for, and obtained, a “Royal Ordinance,” bearing date 30th January, 1818, permitting him to “establish his domicile in France,” and securing to him “the enjoyment of all civil rights so long as he should continue to reside in France”—*that*, from the time when the said deceased obtained the said Royal Ordinance, he continued, constantly, to reside in France, until his death, in March, 1823; save that once only, happening in Sep-

tember or October, 1818, he visited this country on matters of business; and, having remained here only so long as such business required his presence, immediately returned to France—that nearly the whole of his moveable effects were removed to France, and that, in July, 1817, he purchased a considerable landed estate in that kingdom, and assumed the title of Marquis de Ponté, and continued to occupy that estate till his death, though he had entered into an agreement for the sale thereof a year or two preceding his death—that the said deceased had wholly abandoned all intention of returning to England; and that his sole establishment was in France, during the last six years of his life, where he died, “a domiciled inhabitant of that country;” and that, by reason of the premises, “the personal estate of the said deceased ought to be disposed of according to the laws, customs, and usages, prevailing in the kingdom of France, with respect to the personal estate of persons dying domiciled therein.”

2. The second article merely pleaded the exhibit No. 1. annexed to the allegation, to be a true copy of the “Royal Ordinance” mentioned in the preceding article.

3. That by the laws, usages, and customs of France, an alien, who shall have established his domicil in France, by virtue of a “Royal Ordinance,” is entitled to all the civil rights and privileges of a natural-born French subject, during his residence in France—that by the said laws, &c. the personal property of an alien, dying in France so domiciled, is “regulated, disposed of, and distributed,” as if the same belonged to a natural-born French subject dying

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in France; and *that* the said deceased having died in France, so domiciled therein, *his* personal estate "is regulated, disposed of, and distributed," in the same manner, and according to the same rules, as if the same had belonged to a Frenchman.

4. *That*, by the said laws, usages, and customs of France, a Frenchman, or alien so domiciled in France as aforesaid, and dying therein, cannot, by will, deprive his lawful widow and child of the *whole* of his personal property, nor bequeath, to his adulterous offspring and its mother, "*an hereditary portion*," but, *that* a will of that tenor is, by such laws, &c., null and void, to all intents and purposes whatsoever.

5. *That* Thomas Thornton, the deceased, left behind him Elizabeth Thornton, widow, his lawful relict, and William Thomas Thornton, his natural and lawful son, a minor—*that* by the will pleaded and propounded in this cause on behalf of the executor, the deceased's *lawful* widow and child are "*almost wholly*" excluded from any share of the property left by the deceased; and *that* the same is bequeathed, by the said will, to an illegitimate daughter of the said deceased, and to *her* mother—consequently, *that* by the laws of France, the said will is null and void, and that the property in question devolves, by succession, upon the widow and lawful child, the same as if the said deceased had died intestate.

6. *That* in June last (1823), the said Elizabeth Thornton, widow of the said deceased, applied to the civil tribunal of First Resort for the department of the Seine, at Paris, for letters of administration of the goods of the deceased in the kingdom of France, as dying intestate by the laws of France, and was

opposed in that application, by the executor named in his said pretended will (the parties, respectively, in *this* cause)—*that* in August, 1823, the president Judge of the said Court, after hearing advocates and solicitors on both sides, adjudged the *possession* of the personal estate and effects of the said deceased to his said widow, and constituted her administratrix thereof, *provisionally*, or *pending suit*—but that “all questions as to the legality, operation, or effect of the said will, still remain undecided in the said suit, though judgment therein is shortly expected to be pronounced” (a).

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7. 8. The 7th article only pleaded the exhibit No. 2, to be an official copy of the proceedings afore-said in the French court, on the grant of administration, provisionally, or pending suit, to the widow; and the 8th was the usual concluding article.

The “Royal Ordinance” being the exhibit No. 1, was as follows:—

PRÆFECTURATE OF THE DEPARTMENT OF  
THE SEINE.

Louis, by the grace of God, King of France and Navarre, to all, &c.

Art. 1. Mr. Thomas Thornton, a native of London, aged sixty years, residing in Paris, is admitted to es-

(a) Accordingly—(subsequent however to the sentence in this Court, the Prerogative Court of Canterbury), the Court of First Instance at Paris has come to a decision, *pronouncing the will null and void, and condemning the executor in costs*—a decision, perhaps, the more extraordinary, as British interests *alone* were involved in the question: for no French subject or subjects, apparently,

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tablish his domicile in France, for the purpose of enjoying all civil rights, so long as he shall continue to reside therein.

Art. 2. Our keeper of the seals, minister, secretary of state in the department of justice, is charged with the execution of the present ordinance, which shall be asserted in the bulletin of laws.

Done at Paris, 30th January, A.D. 1817, and  
of our reign the 22nd.

(Signed)            LOUIS.

The exhibit No. 2, is omitted, as furnishing nothing material to the question at issue.

#### JUDGMENT.

Sir JOHN NICHOLL.

The present question respects an alleged will of the late Colonel Thornton (*a*). It was made and executed in *this* country, bearing date the 2d of October, 1818; and the testator died at Paris on the 10th day of March, 1823. It begins as follows: "This is the last will and testament of me Thomas Thornton, of Falconer's Hall, and Boythorp, in the East Riding of Yorkshire; and of the principality of Chambord, near Blois, and Pont le Roi, Department de St. Aube, in the Kingdom of France, Esq." Such is the testator's description of himself in the heading of this instrument. The instrument itself gives and be-

were entitled to the deceased's property, or to any part of it, in either alternative; in that of the *will* being pronounced *for*, or in that of the deceased being held to have died intestate.

(*a*) The deceased was commonly known as *Colonel* Thornton, having, formerly, been Lieutenant-Colonel of the Second Regiment of York Militia.

queathes all the testator's real and personal property to his executors, in trust, for payment of his funeral expences, debts, and legacies. It directs that Priscilla Duins shall be allowed to select whichever of his houses, either in England or France, she thinks fit, as her residence, and shall have and enjoy all the household furniture, plate, china, linen, and other household effects which shall be in and about such house, for and during the term of her natural life; together with an annuity of 500*l*. It provides for the maintenance and education of Thornvillia Diana Rockingham Thornton, his natural daughter by the said Priscilla Duins, till she attains her age of twenty-one; and gives her a life interest in all his property (*a*), which it strictly entails, first on her issue, and in failure thereof then, successively, on different branches of his own family. It authorizes the trustees to sell or exchange any part, or parts of the real estate in England or France; but estates purchased with the produce of such sale, or those taken in exchange, *must* be in England *only*. It directs that the surplus of the personal property shall be invested in the purchase of estates, but still, *only* in England. Lastly, it provides that furniture (in general) and other moveable effects shall be sold, and become a part of the surplus so to be invested, except plate, books, paintings, and drawings, which last shall be heir-looms, and belong, in succession, to the tenant for the time

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(*a*) With the exception of a few pecuniary legacies, of no great value in the whole—among which, however, is a bequest of 100*l*. to the testator's son, described in the will, as the "son of Mrs. Thornton." *By the will*, no provision is made for the widow.

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being of the entailed estates. The instrument in question is very long, occupying twenty-eight sheets of paper; it is drawn up in English, manifestly with reference to English forms, and the English law; and it was regularly executed by the deceased, *in this country*, in the presence of three witnesses.

The allegation which is offered on the part of the widow, and the admissibility of which the Court is now called upon to determine, does not deny the *factum* of this will, as I have described it. What it does is this. It suggests, first, that the will is invalid by the law of France; and, secondly, that under the circumstances pleaded, the effect of that invalidity is, to defeat its claim to probate in the courts of this country.

The counsel for the executors have taken a sort of general, *preliminary*, objection to the admission of this allegation, namely, that the question sought to be raised upon it, is not one which this Court, a mere Court of Probate, ought to entertain. They have contended, that the will propounded in this cause being such as I have described, and having been made and executed here, in England, by a British-born subject, is, absolutely, and at all events, entitled to probate in this Court, *de jure*, on due proof of the *factum* of the instrument—be its effect, or operation, what it may. Upon these last, they have argued, it rests not with this Court, but with a Court of Construction, the Court of Chancery, to decide; which, being satisfied; First, That the law of France ought, in substance and effect, to govern this case; and Secondly, that that law is what it is pleaded to be in this allegation, will make the executors who



have taken probate here, mere *trustees*, for the benefit of the lawful widow and child. I am not prepared to say, that the objection so taken *in limine* is quite unfounded; but it may be unnecessary to settle *that* point upon the present occasion. It neither is, nor can be, denied, that a will of the description of Colonel Thornton's, is entitled to probate *prima facie*—and that to oust its title to probate, it must not only *clearly* appear to be invalid by the law of France, but, by reason of such invalidity, to be *also* invalid by the law of this country. I proceed, therefore, at once to inquire whether such would be the just legal result of the facts stated in this allegation; taking them, for the purpose of the argument, to be not merely capable of proof, but actually proved—upon the result of which inquiry must plainly depend the question immediately at issue before the Court; the admissibility namely, or the contrary, of the present allegation.

The *facts* relied upon in the allegation, by way of defeating the claim of this will to probate, are these—that, in 1815, the deceased went to France, and *finally* withdrew from England in 1816, the following year—that, in 1817, he applied for, and obtained, a “Royal Ordinance,” authorizing him to fix his domicil in *that* country, and assuring to him, during his residence there, the enjoyment of all civil rights—that he continued resident in France *from* that time till his death there, in March, 1823, only once, *in* that time, coming over to England, merely to transact matters of business (one of such matters of business, plainly, from its *date*, being the making of the will in question)—finally, that he removed *nearly* all his

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The succession to the personal estate of a British subject, dying domiciled in any part of the British empire, *intestate*, is to be regulated by the law of that part of the British empire, which was his domicile at the time of his death.

moveable effects to France, and purchased an estate or estates there, in 1817, which estate or estates he actually retained to the time of his death.

The Counsel, who argued in support of this allegation, have cited a variety of cases (a) tending to shew, that the succession to the personal estate of a British subject, dying domiciled in any part of the *British* empire, is regulated by the law of that part of the British empire which was his domicile at the time of his death. Thus, of a Scotchman dying domiciled in *this* country, the effects, both Scotch and English, are to be distributed according to the law of this country, and not according to that of Scotland, the intestate's domicile of origin—and *vice versa*. The plain reason seems to be, *that*, of *British* domicils, a British subject is free to select whichever he pleases—and, dying domiciled in any part of the *British* empire, other his domicile of origin, *intestate*, the fair presumption is, that he intended his property to be distributed conformably to the known law of that part of the British empire, for which his domicile of origin was so, lawfully as well as in fact, abandoned. Again, if a foreigner die abroad, in his own country, leaving property here, as in the British funds, the succession to that property is to be regulated by the law of his own country, and not by that of England—for England, in such case, is merely the *locus*

*than*

(a) See the principal of these, if not all these, referred to in the case of *Somerville v. Lord Somerville*, 5 Ves. 750, *et seq.* where the various cases and authorities on the subject of domicile, as connected with this particular question of succession to personal property in cases of intestacy, are stated, and commented upon, in the argument and sentence, at great length, and with great ability.

*rei sitæ*, the law of which has little to do with the question of distribution, according to modern decisions (a). These are points definitively settled: but no case has been cited, conveying to my mind, that a British subject who has abandoned (if, indeed, a British subject can abandon) his *forum originis* for

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(a) This point is said to have been *completely* settled in *Balfour v. Scott*, (Lady Titchfield's case) in the House of Lords, 11th April, 1793. Accordingly in the *Annandale* cause (*Bempde v. Johnstone*), 3 Ves. 198, the Lord Chancellor took the question as *concluded*; intimating, however, a doubt of his own upon it, if the question was still open. His Lordship said, "I am bound by repeated decisions in the House of Lords to make the decree I intend to make; that the deceased had *that* domicile in England that decides upon the succession to his personal property, and carries the succession according to the law of England. The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether in the case of a person dying intestate, having property in different places, and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many foreign lawyers have held that proposition. There was a time when the Courts of Scotland certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicile, and the law of that country where the domicile is, decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which, the Courts of Great Britain, both Scotch and English, are bound to act."

In the *Somerville* cause, the Master of the Rolls expressed himself "as having some reason to think that our Spiritual Courts once inclined to the *lex loci rei sitæ*, as well as the Courts of Scotland; and that this might have furnished the rule of decision upon similar questions *there*, if the authority of the House of Lords had not interfered." See 5 Ves. 791.

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a *foreign* domicil, is liable to the law of that *foreign* domicil for the distribution of his property *here*, even though dying *intestate*. I speak only of his property situate *here*—for it is obvious that the Courts of this country, even if entitled *de jure*, are empowered *de facto*, to determine nothing with reference to the distribution of his effects situate locally in a foreign country.

None of the cases then, with which I am acquainted, or to which I have been referred, are in point to the case contended for by the counsel for the widow, to an extent beyond that which I have already stated. Meantime, they go fully to demonstrate *one* thing, namely, that the *forum originis* is *hardly* shifted—that it continues *at least* till it is *completely* abandoned, and another taken. This rule is to be collected in particular from the Somerville cause (a), where the Master of the Rolls held the intestate's Scotch domicil, his domicil of origin, clearly to prevail over his English domicil—consequently holding, that his personal property was liable to be distributed according to the law of that country, and not according to the law of England; although the intestate

(a) "The third rule I shall extract \*," said the Master of the Rolls, in delivering judgment in the Somerville cause, "is, that the original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired *another*, but has manifested, and carried into execution, an intention of abandoning his former domicil, and taking another as his *sole* domicil." 5 Ves. 787.

\* Namely—from the opinions delivered by Lords Thurlow and Loughborough, the former in *Bruce v. Bruce*, the latter in *Ommaney v. Bingham*, in the House of Lords; and from the cases and authorities referred to, and brought forward in those cases.

had been principally resident, for a long series of years, and actually died, in England. In the Somerville cause, however, the question lay between *two* domicils, either of which, as being both British, the deceased was free to select. The difficulty of a British-born subject shifting his *forum originis* (not for another British, but) for a *foreign* domicil, to say the least, must be infinitely greater, and more considerable. It may even be doubted whether this can be—whether a British subject is entitled so far “*exuere patriam*,” as to select a foreign domicil in *complete* derogation of his British; which he must, at all events, do, in order to render his property in this country liable to distribution according to any *foreign* law. But, however that be, this is certain; that the *only* abandonment of his *forum originis* by a British subject, which is adequate to *this* effect, must be a *total* and *complete* one; supposing him capable, that is, of any such *total* and *complete* abandonment of his *forum originis*; a matter which not only rests upon no authority, but which is somewhat doubtful, I think, even upon principle.

Now to what does the case before the Court, viewed as with reference to these principles, really and substantially amount? Stript of mere averments of intention, as of fixing his *sole* domicil in France, and so forth (and such averments of intention, not deducible from the *facts* pleaded, are of no avail whatever in the cause), the allegation amounts to this—that Colonel Thornton, some years prior to his death *there*, went to reside in France, and, soon after, applied for, and obtained a “Royal Ordinance,” as-

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But *quare*, whether a British subject can so far “*exuere patriam*,” as to render his property *here* liable to distribution according to any *foreign* law, even in case of his intestacy?

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suring to him certain privileges, so long as he should reside in France; and *that*, during his residence there, he purchased an estate, or estates, (which, by the way, he had contracted to sell, though they are pleaded to have been in his *actual* occupation at the time of his death) assuming from this, or one of these, a territorial title, that of Marquis de Ponté. But was his British domicil *completely* abandoned during this interval, and was France, if his domicil (properly speaking) at all, his *sole* domicil? By no means: this instrument, the will, itself, furnishes pregnant proof to the contrary. It proves, that the deceased never sold or disposed of his mansions in England—it proves, that he neither parted with, nor removed to France, his valuable (I may presume his most valuable) *moveables* even, as plate, books, paintings, and drawings; for the will makes, or purports to make, these, heir-looms upon his English estates. In short, it proves, as with reference to provisions upon which I shall presently observe, that the deceased, in his own mind and apprehension, never ceased to be an Englishman; and that, *as* this country was the place of his own nativity, and personal sojourn during, by far, the greater portion of his life, so, *to* this country it is that he himself was looking as the fixed seat and permanent habitation of his successors and posterity. Why upon *these* considerations, upon the application of *these* principles, if correct, to the case before the Court it can entertain, perhaps, little doubt that the personal property of the deceased ought to have been distributed according to the law of *this* country, and without any reference to that of France, even though he had left no will, and the case had been one of intestacy.

But the case in question is not a case of intestacy. The deceased left a will. Now admitting, for argument's sake, that this Court would have been bound to defer to the law of France in the *supposed* case, that of an intestacy, will it necessarily follow that it is also bound to defer to it in the *actual* one, that of the deceased having left a will? This, again, appears to me somewhat questionable, even upon principle. Cases of testacy are subject to different considerations from those of intestacy, in this respect, for obvious reasons. In the latter case, for instance, the question lying between *two* domicils, the intestate's property is to be distributed according to the law of this, or that, in virtue of his own *implied directions* to that effect: to ascertain which, the real question in every such case is, which of the two is it to be presumed that the testator himself considered to be his domicile? But there can be neither room, nor need for any such inquiry in the case of a will: testacy supposes, *ex vi termini*, *express* directions from the testator relative to the disposal or distribution of his property: and that law must obviously govern, in the case of every will, to which the will itself is found (not by a mere casualty, but technically, and, therefore, on the testator's part *designedly*) to conform—provided, that is, the *testator* be entitled to a voice in the premises. Hence, it should seem by no means to follow, *universally*, even upon principle, that a will, to be valid, must strictly conform to that law, which would have regulated the succession to the testator's property, if he had died intestate. But whatever be the supposed foundation for a different notion upon principle, it

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Though admitting this to be, it would by no means follow, that his *will*, to be valid *here*, must conform to that foreign law, either upon principle,

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plainly rests upon no footing of authority. No adjudged case, not even a single *obiter dictum* has been cited, which can be taken to countenance *that* notion. In the Somerville cause, for instance, it was ruled that, the deceased dying intestate, the succession to his property was to be regulated by the law of Scotland. But is it any where hinted, even *arguendo*, in the long and elaborate report of that cause, that had the deceased left a formal, technical, will, *strictly* valid, in consequence, by the law of *this* country, its non-conformity to *Scotch* law, under the circumstances, would have amounted to a total defeazance of that will? is it any where hinted, in other words, that the deceased in that cause was *only* testable (and as to *all* his property) in the precise manner and form, and subject to the strict rules and limitations imposed, by the law of *Scotland*, upon testacy? I am confident that nothing occurs throughout that report upon which such an inference can be fairly raised. Not that if it had occurred, it might have furnished any rule of *very strict* application to the present case. Scotland, in the Somerville cause, was the *forum originis*. Here the *forum originis* being *this* country, and the will being such as I have described, it might possibly, at all events, be entitled to probate *here*, even though null and void by that law (as, for instance, the law of Scotland, or of Jersey, could the deceased be argued to have been domiciled *there*), according to the provisions of which this Court would have been bound to decree a distribution of his effects, had he left no will, but died intestate.



At the same time it is true, with all this, that where property is to be distributed under a certain law in a case of intestacy, it ought to be so distributed in the absence of a will valid by, and according to, that law. But this rule only applies to cases in which, there being no conflict of domicils, it admits of no question by what law the case, whether ultimately to be deemed one of testacy or intestacy, ought to be governed. Upon this principle the Court proceeded in a case to which I shall presently advert, that of *Nasmyth (a)*. But the Court is quite prepared, were it necessary, to deny the fit application of that rule to a case circumstanced like the present; both for reasons which have appeared and for others to be stated in the sequel, which may possibly render its *unfitness* of application to the present case, still more apparent, and still less disputable.

The case set up on the widow's part, is one, I have said, utterly destitute of authority. On the contrary, a case has been cited by the counsel for the executor, which is pretty precisely in point, the other way. The Duchess of Kingston made a will at Paris, which (being neither holographic, nor executed in the presence of two notaries, nor executed in the presence of two witnesses and one notary, but in the presence of three witnesses merely) according to the *then* custom of Paris, [1786], was absolutely null and void. But the testatrix being, by birth, an Englishwoman, and the will being in English, and duly executed according to English forms, it was not only admitted to probate *here (b)*, (which is ample to make it point

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The rule that, where property is to be distributed under a certain law, in a case of intestacy, it must be so distributed in the absence of a will valid by that law, only applies to cases, in which, there being no conflict of domicils, the law by which the case must be governed, whether ultimately to be deemed a case of testacy, or one of intestacy, admits of no question.

(a) See note subjoined at the end of this case, page 25.

(b) Probate was opposed *here, non constat* upon what grounds, by the next of kin. But the cause proceeded no further than to

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to the question at issue), but it was also deemed valid in France, if the judgment of a French lawyer of eminence (*a*) is to be relied on—whose opinion to that effect, taken expressly upon this very case, is printed and published in the first volume of the "*Collectanea Juridica*." The Duchess, however, had not only taken up her residence in France, (where *she*, also, died) under "letters patent registered in the Parliament of Paris," couched in terms of privilege, it should seem, full as ample as Colonel Thornton's "Royal Licence," but her will, the instrument in question, was actually made, and executed, at, and in, Paris. Here the will was made in England—during the testator's stay in which, his French domicile was at least suspended; and his rights as a British subject, supposing them to have been *ever* waived or forfeited by, clearly reverted to him.

And this, by the way, together with some provisions of the will itself, upon which the Court is pledged to advert, suggests another principle fairly invocable into the case, and by which, were it necessary again, the claim of this will to probate, might be still further strengthened and sustained.

It is said, in substance, by Lord Mansfield, in the case of Robinson and Bland, as reported by Mr. Justice Blackstone (*b*), that contracts are to be examined on a common *condidit* propounding the will. The opposition of the next of kin was then withdrawn: and the Court, thereupon, in 1791, decreed probate to the executors.

(*a*) Monsieur Target. See *Collectanea Juridica*, vol. i. pp. 323. 331.


(*b*) Sir William Blackstone's Reports, vol. i. pp. 234. 248. and 256. 264. See also Burrough's Reports, vol. ii. p. 1077.

pounded according to the *lex loci*, or law of the place in which they are *made*, save only where the parties, at the time of making them, had in view a *different* place; an exception which makes the rule itself well consist with Huber's principle (a), that contracts are to be expounded according to the *lex loci* in which they are to be *executed*.

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Now, taking the principle, *mutatis mutandis*, to be as applicable to *wills*, as to contracts, what does *this* principle suggest with reference to the case before the Court? The instrument in question is not only made in this country, but it is to this country that the testator himself limits its full, and final, effect and operation. The surplus of his personal effects is to be invested in the purchase of estates in England; *only*—such estates as he dies possessed of, either in France or England, are made liable to be exchanged for others, at the discretion of his executors and trustees, but such *other* estates, so taken in exchange for any that he dies possessed of, are expressly required to be in England, *only*. Here, then, the will was both made, and was to be, finally, executed; and these provisions, again, plainly negative the case set up in the allegation, of a *voluntary, total, abandonment* of his native country by the testator; and prove him, upon his own shewing, to have never ceased to be an *Englishman*.

(a) *Verumtamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo intelligitur, in quo, ut solveret, se obligavit.* Hub. de confl. leg. l. 1, t. iii. s. 10.

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In Nasmyth's case (a), which has been deemed so precisely in point by the counsel for the widow, the principal material circumstances were, almost, the reverse of these. The deceased was a Scotchman by birth, and though he died here, it was merely *in transitu*; for it is not suggested that, either in law or fact, he was ever *domiciled* in this country. Scotland, too, was the *locus in quo* the will was *made*; in which it was *found*; and in which, properly speaking, it was to be *executed*. Upon a question touching the validity of such a will, made by such a testator, the Court thought (and still thinks) that it was bound to defer to the law of Scotland—this country being *merely*, in Nasmyth's case, the *locus rei sitæ*—the place in which the property, or rather a part of the property, purported to be conveyed under the will, was locally situate. In the present case, *this* is the *forum originis*—it is, also, *quoad hoc*, I think, the *forum domicilii*; for I very much question whether *this* deceased, at all events, was ever *so* domiciled in France as to render his property here liable to distribution according to the law of France, if he had died intestate—*this*, again, so far as regards the property which a sentence of this Court can affect, is the *forum rei sitæ*, a circumstance, perhaps, not wholly immaterial, taken in conjunction with others, though of little, or even of no moment, standing alone—*this*, lastly, is the *forum contractus* as it were; for the will was *made* in this country; was to be *executed* in this country; and, was drawn up plainly with reference, and in strict conformity to the highly technical requisites, in

(a) See note subjoined at the end of this case, p. 25.

that behalf, of the *law* of this country. Under these circumstances, how totally inapplicable the case of Nasmyth is to the position contended for by the counsel for the widow in the present case, must, after what has already fallen from the Court, be too obvious to require any comment.

Upon the whole, being satisfied that the facts pleaded are insufficient to affect the validity of the *will* which has been propounded in this cause, the Court has no difficulty in saying that the present allegation must be *rejected*.

Allegation rejected—Costs were prayed  
against the widow, but the Court  
—refused to give costs.

#### HARE and Others v. NASMYTH.

(*In the Goods of Dr. James Nasmyth.*)

THE suit of Hare v. Nasmyth, twice referred to in the “Judgment,” or rather that part of it material to any question of *domicil*, was briefly as follows:—

The deceased in that cause, Dr. James Nasmyth, usually resided at Hope Park, near Edinburgh (*a*); but, in the year 1812, he came to London, where, though intending from time to time to return into Scotland, he remained till his death, which took place on the 7th of December, 1813. He left behind him certain testamentary papers, which were propounded, in Hilary Term, 1815, by the asserted executors, in the Prerogative Court of Canterbury (the deceased having left large personal property within the Province of Canterbury (*b*)); and the admission of the

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On the validity of a will made by a domiciled inhabitant of Scotland, the Court here will ~~decide~~ *defer* to the law of Scotland: and will pronounce in favour of the will, or that the deceased died intestate, according as that question is determined by the Scotch Court of Probate.

(*a*) The deceased, in early life went to India: but he returned to Scotland in 1798: and from that time to 1812 he usually resided at Hope Park House, as above.

(*b*) The deceased, in addition to considerable real and personal property in Scotland and the Island of Jamaica, was stated to have left personal property in this country to the amount in value of 70,000*l*.

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allegation propounding them was opposed by Counsel for the next of kin, upon grounds, however, quite distinct from any question of *domicil*. The Court [Sir John Nicholl] expressed itself as inclined to think, that the legal presumption against the papers propounded was, as contended, too strong to be encountered by the circumstances pleaded, and, consequently, that the allegation was inadmissible; as laying no case capable, if proved, of giving the papers propounded legal validity, *according to our law*. At the same time, it appearing on the face of the proceedings, that the deceased was a domiciled subject of Scotland, the Court itself suggested (a suggestion upon which it subsequently acted, *after mature deliberation*) the propriety of *suspending* its proceedings; until a suit, stated to be then depending in the Courts of Scotland, touching the validity of the identical papers propounded in this (the Prerogative) Court, should be decided; for the reasons, and upon the principles stated and illustrated in the foregoing judgment—intimating, that it might feel it its duty to pronounce for the validity of the testamentary papers, or that the deceased had died intestate, *according as the Courts of Scotland should determine that question, either upon general principles, or upon principles applicable to the subject, if any, peculiar to Scotch jurisprudence*.

Proceedings in the Prerogative Court were, accordingly, suspended, and the admissibility of the allegation propounding the asserted will and codicils of the deceased was never, finally, debated. For the papers in question having been, in effect, pronounced for by the tenor of three interlocutors of the Lord Ordinary of Scotland, bearing date on the 18th day of May, the 9th of June, and the 14th November, 1815; and also of an interlocutor of the second division of the Court of Session there, bearing date the 7th day of June, 1816, the next of kin of the deceased declined any further opposition to probate passing in the Prerogative Court; and probate of the asserted will and codicils was thereon decreed, *by the Prerogative Court*, to the executors, on the second Session of Michaelmas Term, 1816; official, or authenticated, copies of the sentences of the Lord Ordinary, and of the Court of Session in Scotland, being first brought in.

Subsequent to this, however, the next of kin appealed from the above interlocutors of the Lord Ordinary, and of the second division of Court of Session, in Scotland, to the House of Lords;

and that appeal, having been duly prosecuted, came to a final hearing, on the 27th of June, 1821; when their Lordships were pleased to reverse the said interlocutors, and to find that the asserted will and codicils were of no effect or avail in law, as testamentary dispositions. Upon this a proctor on behalf of the executors *brought in* the probate of the said asserted will and codicils of the deceased, decreed as aforesaid by the Prerogative Court of Canterbury, and consented to the same being revoked—whereupon the Court, on the fourth Session of Michaelmas Term in that year, proceeded to revoke the said probate of the asserted will and codicils; and *finally* to decree administration of the goods of the deceased as dead intestate (according to its own original impression) to certain next of kin—an official copy of the judgment of the House of Lords, above referred to, having first been brought into Court by the proctor for the next of kin.

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### CONSISTORY COURT OF LONDON.

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#### HULME v. HULME.

(On the admission of the libel.)

**THIS** was a cause of separation, *à mensâ et thoro*, by reason of cruelty and adultery, promoted by Harriet Hulme, of the parish of St. George, in the county of Middlesex, and diocese of London, against her husband, John Hulme, of the same parish, county, and diocese.

The libel pleaded, “that the parties were married in the month of January, 1819, and that they continued to live and reside together from that time till the beginning of February, 1820; that the said Harriet Hulme then quitted her said husband by reason of his violent conduct towards her, pleaded and set forth in the libel, and that she had never since lived or

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Cruelty may be, without actual, personal violence; and such cruelty, (at least) when coupled with adultery, may found a sentence of separation on both grounds.

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resided with him: It also pleaded, that in the same month of February, 1820, the said Harriet Hulme exhibited articles of the peace against her said husband, the said John Hulme, at the General Sessions held, for the county of Middlesex, at the Sessions House at Clerkenwell, and *that*, thereupon, the said John Hulme was bound by the Justices to keep the peace towards his said wife, himself in 200*l.*, and two sureties in 100*l.* each."

In objection to the admission of this libel, so far as it went to set up a case of legal *cruelty*, it was argued, that the cruelty was laid to consist in menaces only, it not being pleaded that the husband had carried these, or any of them, into execution; even so far, as to be betrayed, in a single instance, into the commission of *actual violence* towards the wife. The case was distinguished in this respect from that of *Otway v. Otway (a)*; in which a similar objection had been taken and over-ruled (*b*)—as, though menaces were *principally* relied on in that case, still some (minor indeed) *acts* of violence were also charged on the husband, in order to found the prayer of the wife. The different *circumstances* of the parties to the two suits, respectively, in point of age, condition, &c. were also insisted upon: and the case of *Otway v. Otway*, throughout, was shewn to be materially distinguished from the present, in many particulars; especially with respect to the more specific nature of the charges, and the time within which the proceed-

(a) *Otway v. Otway*, 2 Phillimore, 95.

(b) Namely, on the admission of the libel; though no report of the argument, or judgment, is in print, that the editor is aware of.



ings were commenced, in the case of *Otway v. Otway*. The menaces, or even acts of *inchoate* violence (so calling them) charged in this libel, were admitted to be of the grossest description (*a*); it was also admitted that menaces only, suggesting the probability of great personal violence, might possibly constitute a case of legal cruelty. But the ground of holding the fitness of divorce, by reason of cruelty consisting in menaces *only*, was argued to be this—the probability of *menaced* violence, especially of a certain description, leading to, and terminating in, *actual* violence, of which Courts are bound to interfere not only for the redress, but also for the prevention. Hence it had constantly been inquired in such cases, was the court to wait till the mischief was done, till the offence was consummated, before it intervened? Here, it was said, that argument does not apply: the parties have been separated upwards of three years, nor is it suggested that the husband is seeking either to compel, or even to persuade, the wife to return to cohabitation. Added to this, the wife has exhibited articles of the peace against the husband: and the husband is actually bound to keep the peace, towards her, himself in 200*l.* and two sureties in 100*l.* each. Consequently, the Court is not called upon, in this instance, to interfere for the prevention of mischief—the wife has resorted

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(*a*) For instance, it was pleaded that the husband *threatened* on one occasion, “to cut his wife’s arm off, and beat her brains out with it;” and, on another, (a few days after her *confinement*) “to pull her out of bed and kick her up and down the room:” also, that he “once seized a red hot poker and brandished it, and *threatened* to run her through with it,” and that he often *attempted* to strike her, &c. &c.

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for that to another tribunal, the interposition of which she does not suggest to have been ineffectual: so that the ordinary ground for dealing with menaces as with legal cruelty seems to fail in this case. But,

#### THE COURT

Was of opinion, *that* the husband's conduct as pleaded, notwithstanding all this, *was* of a nature to found a case of legal cruelty, and consequently that the libel was admissible *in toto* (a).

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### HIGH COURT OF DELEGATES.

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#### MILLER v. BLOOMFIELD and SLADE.

An allegation—responsive to a libel thentofore admitted in the cause, pleading a church-rate including “stock in trade.” [See vol. i. p. 499.]—suggesting, 1st. that the parishioners were omitted to be rated for “shipping;” 2dly. that several parishioners possessed of stock in trade, were *altogether* omitted to be rated in the said rate, and consequently that the rate was invalid—directed to go proof.

**THIS** was a question as to the admission of an allegation, responsive to the libel thentofore given and admitted in the cause: for which, and for the nature, and circumstances of this cause, see *ante*, vol. i. p. 499, *et seq.*

The allegation (in substance pleaded),

Art. 1. That the church-rate, the subject of the suit, was not made agreeable to the then present poor-rate, for the said parish as pleaded in the said libel; for that parishioners and inhabitants of the said parish, the owners or proprietors of ships of the burthen of twenty-four tons register, each, and upwards, *were* rated, and assessed, for the said ships or vessels, to the said poor-rate, but were wholly *omitted to be*

(a) This cause came to a final hearing on the by-day after Trinity Term, 1824, when the libel was held to be *proved* in both particulars; and a divorce was consequently pronounced for, *on both grounds*.

*rated*, and assessed, for the same, to the said church-rate for the said parish. And the article went on to plead, *that* the several parishioners whose names were set forth in a paper writing or exhibit annexed, marked A, were proprietors of the several ships, or vessels, expressed, of the tonnage expressed, and were rated, and assessed, for the said ships or vessels, at the sums expressed, to the poor's rate in force for the said parish at the time of making the said church-rate; but that such parishioners were altogether omitted to be rated, and assessed for such ships or vessels, to the said church-rate.

2. The second article pleaded, *that* the mode of making the church-rate within the said parish had not been uniform, but had varied, from time to time, in manner following, viz. "that from the year 1751, or thereabouts, until in, or about, the year 1773, lands, messuages, and tenements, within the said parish, and personal property, or stock in trade, including therein ships belonging to parishioners and inhabitants of the said parish, but *not* money in the public stocks or funds, or otherwise at interest, were rated, and assessed, to all the different church-rates"—*that* "from the year 1773, until in, or about, the year 1792, lands, messuages, and tenements, within the said parish, and personal property belonging to the parishioners and inhabitants of the said parish, including therein, ships, *and* money in the public stocks or funds, or otherwise at interest, were rated and assessed, to all the different church-rates:"—*that* "from the year 1792, until in, or about, the year 1800, such lands and tenements, stock in trade, and ships *only* (but not money at interest in the stocks, or otherwise, as in the interval between 1751 to 1773) were so rated,

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or assessed"—and lastly, *that* "from the said year 1800, till the present time, such lands and tenements, and stock in trade, but neither money at interest, as above, nor ships, had been rated and assessed to the different church-rates, made for the said parish." And the article further pleaded, *that* Miller (the defendant) "*was not by law rateable to the said church-rate both for his messuages, tenements, and hereditaments, and also for his stock in trade in the said parish, and that therefore, he was not justly rated and assessed to the said rate or assessment as aforesaid,*" nor was such rate or assessment, made agreeable to the usual mode of making the church-rate in the said parish, as pleaded in the libel.

3. The third article pleaded—*that* the several parishoners, twelve in number, whose names were set forth in the paper-writing, or exhibit, marked B, annexed, were then, and at the time of making the said rate, possessed of stock in trade within the said parish: but, together with other persons also possessed of stock in trade in the said parish at such times, were altogether omitted to be rated, either to the said poor's rate, or to the said church-rate, for the same.

4. The fourth was a general, concluding, article; praying, *that* the said church-rate might be pronounced to have been unduly made, and assessed, and that Miller, the appellant, (the original defendant) might be dismissed from the suit, and from all further observance of justice therein.

The counsel for the appellant were proceeding to argue against the admission of the allegation, but were stopped by the Court.

*Per Curiam.*

Mr. Justice BEST.

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The rateability of stock in Pool, to the church, *generally*, was determined, at least *sub modo*, by the Court, upon the admission of the libel; a decision with the principle of which, none of the facts pleaded in the allegation about to be debated, seem to the Court, materially, to interfere. They even establish the *substantial* averment of the libel, that stock has *uniformly* been rated to the church in Pool; though the practice, under *circumstances*, may have *varied*, as to the particular *kinds* of stock included, from time to time, in the several rates. Accordingly, the allegation must, at all events, be reformed, by striking out that part of the second article which pleads that the appellant was "*not liable to be rated, both for his lands and tenements, and also, for his stock in trade.*" At the same time, we are clearly of opinion, that of the objections taken to this *particular* rate, one, at least, must ultimately be fatal. If stock in trade be taxable to the church, so *also* must shipping be, especially in Pool; where shipping are taxable, in common with other stock, to the *poor*, under a decision of the Court of King's Bench, made as with reference to this town of Pool, in particular (a). Again, of parishioners holding stock in trade in Pool, some are pleaded to be omitted, altogether, in the rate. This also would, probably, be fatal to the rate; but that the prior objection would be, (of course taking the fact to be as pleaded, namely, that shipping are omitted to be rated, altogether), seems to the Court to be nearly certain. Under these circumstances, would it

(a) See the case of *Rex v. White and Others*, 4 T. R. 771.

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not be advisable for the vestry, to desist from enforcing the present rate; and to make a new rate, including, both shipping, and the stock, if any, of parishioners omitted in the present rate? Such a rate this Court might hold to be valid; and, probably, neither the present appellant, nor any other parishioner, after this intimation of the Court's opinion, would object to the payment of his proportion of a rate so constructed. Should this suggestion be acceded to, it will preclude the necessity of counsel going through a detail of their objections to the admission of the present plea.

The Counsel for the appellant, and respondent, after some deliberation, having mutually, for themselves, conditionally acceded to this suggestion.

*Per Curiam.*

As for the present, the allegation, with the suggested omission, must stand *admitted*.

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The Judges who sat, upon the admission of this allegation, were

Mr. Justice GARROW,  
 Mr. Justice BEST,  
 Dr. ARNOLD,  
 Dr. JENNER,  
 Dr. DAUBENY,  
 Dr. GOSTLING,  
 Dr. DODSON,  
 and  
 Dr. LEE.

## HILARY TERM.

## 1st Session.

IN THE PREROGATIVE COURT OF CANTERBURY.

OLIVER and TUKE v. HEATHCOTE.

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1st Session:

*(Upon an Objection to "Personal Answers.")*

**JOSIAS COCKSHUT TWISLETON**, the party deceased in this cause, late of Osbaston Hall in the county of Leicester, died the 30th March, 1821, aged 82 years. A will of the deceased, bearing date the 4th of March, 1818, was propounded on behalf of the Reverend John Oliver, and John Tuke, two of the executors named therein; and was opposed on the part of Mary Heathcote (wife of Bache Heathcote, esq.), his only child.

It had been pleaded on her part, in reply to a *con-  
didit* given in on behalf of the executors, that the deceased, for many years prior to the date of the will in question, was labouring under mental delusion, of which her allegation had also stated a variety of *supposed* instances; and, *that* he was not in possession of testamentary capacity at the time when the said will purported to bear date (*a*). It was pleaded by

"Personal answers" are not confined to being mere echoes of the plea, accompanied with simple affirmances or denials; but the respondents are further at liberty to enter into all such matter as may fairly be deemed not more than sufficient to place the transactions as to which their answers are taken, in what they insist to be, the true and proper light.

An objection taken to "answers" for redundancy, held, upon this principle, not to be sustained; and, consequently, over-ruled.

(*a*) In the month of November, 1818, the deceased had been found a lunatic, and to have so been, without lucid intervals, for the space of two years then last past, under a "commission in the nature of a writ *de lunatico inquirendo*," which issued about that time out of Chancery, on the petition of Sarah Cockshut Twistleton, his then wife. And Mr. and Mrs. Heathcote, respectively, his son-in-law and daughter, afterwards petitioned for, and obtained, a "commission of lunacy" against the deceased; and were appointed committees of his person and estate, under that return.

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the executors, in rejoinder, that the deceased, though a man of singular and eccentric habits, and profuse in his expenditure, or an "unthrift," never laboured under mental delusion, until several months subsequent to the month of March, 1818, the date of the will. And in affirmance of that averment, they had proceeded to state numerous matters of moment and concern, in which the said deceased was engaged up to that period, and which he personally transacted; with the knowledge and approval (so pleaded) of the very parties now setting up that he was insane at those times, and had been so, for years preceding.

Among other specific instances of the deceased's capacity, up to the period aforesaid, pleaded by the executors, was the following, as stated in the ninth article of their rejoinder, or second allegation:

"That, after the said Josias Cockshut Twisleton, the party in this cause, deceased, had made and executed his last will and testament, bearing date the 4th day of March, 1818, to wit, on or about the 9th day of the said month of March, he, the said deceased, went from his said house at Osbaston, to an inn at Burton-upon-Trent, known by the sign of the *Queens*, and did there meet Mr. William Osborne, of Burton-upon-Trent, aforesaid, attorney-at-law, by appointment; for the purpose of entering into, and he did then and there enter into, and sign, a contract or agreement with the said William Osborne, as the attorney of Messrs. Peels, near Derby, for the purchase of an estate near Derby, called the *Pastures*, adjoining or contiguous to an estate then the property, or in possession, of the aforesaid Bache Heathcote, for the sum of thirteen thousand pounds, or thereabouts. That the terms of the said purchase had been



previously settled by, or between, the said William Osborne, as the attorney for the vendors, and the aforesaid Cockshut Heathcote, esq., the grandson of the said Josias Cockshut Twisleton, esq., the party deceased, on the part of him the said deceased. And he, the said Cockshut Heathcote, esq., was the person, who, on behalf of the said deceased, corresponded with the said William Osborne respecting the said purchase. *That* on the said occasion when the said deceased so went to Burton-upon-Trent, and entered into such contract, or agreement, he was accompanied thither, in his carriage, by the said Sarah Cockshut Twisleton, his wife, and the said Cockshut Heathcote, his grandson; and he, the said Cockshut Heathcote, was present with the said deceased, and the said William Osborne, during the whole of the time that was occupied in transacting the said business. *That* when the contract for the said purchase was so entered into and signed, he the said deceased, gave a draft for the amount of the deposit money to the said William Osborne, drawn on a Mr. Robert Plummer Weddall, who [as pleaded in the seventh article of the allegation] had contracted for the purchase from him, the said deceased, of a part of his estate at Goole in the county of York; and he, the said deceased, as a reason for paying the said deposit by such draft, told the said William Osborne, that he had, then lately, sold an estate to the said Robert Plummer Weddall, and that he had not the least doubt of such draft being duly honored, or to that effect: but the said draft was not honored. *That* the said Josias Cockshut Twisleton, the party in this cause deceased, was, at and during all the time hereinbefore mentioned, perfectly rational, and sensible, and well knew and understood

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the nature of the contract or agreement which he then signed, or entered into; and well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of contracting for the purchase of the said estate, called the *Pastures*, and of doing any other act of that, or the like, nature. That the said Bache Heathcote is now in possession of the said estate, called the *Pastures*, under the contract or agreement hereinbefore mentioned; and the said Cockshut Heathcote acted, throughout the transaction as to the said contract, or agreement, by the directions, or with the knowledge, and approbation, of the said Bache Heathcote, or of Mary Heathcote his wife."

The "*personal answer*" of Mrs. and Mr. Heathcote, the next of kin, and her husband, to this article of the executor's allegation was, as follows:

"To the ninth position or article of the said allegation, these respondents *answer*, and say, they believe, *that* in the course of the said deceased's journey from York to Osbaston, in the month of February, 1818, he heard that an estate in Worcestershire was on sale; and that the said deceased, then labouring under the delusion that he had very extensive estates, producing a rental which he, at various times, stated to amount from 80,000*l.* to 70,000*l.* a year, and that he had large sums of money at his bankers, unproductive of interest, declared his determination to stay at Osbaston a few days only; and then, of proceeding from Osbaston into Worcestershire, and of purchasing that estate; and that he also expressed a wish to purchase other estates which he heard were to be sold: and the respondents, being apprehensive that the said deceased

would, under such aforesaid delusion, proceed into Worcestershire, and involve himself in further pecuniary difficulties, by entering into a contract with parties, perfectly unacquainted with him, for the purchase of estates of great extent, and value, the consequence of which might be ruinous to himself; and with the view of diverting his mind from his proposed journey into Worcestershire, informed him, that the articulate estate, called the *Pastures*, was to be sold. *That* the said deceased immediately declared his intention of purchasing it, and desired the respondent's son, the said Cockshut Heathcote, to go over to Burton, and buy the said estate. *That* the said Cockshut Heathcote, having afterwards, informed the said deceased of the price asked for the said estate, he, the said deceased, without having seen the same, or knowing the quantity or quality of the land, or having taken the opinion of any one as to its value, or ever asked a single question respecting it, declared, that the said estate was very cheap, and that he would purchase it; *that* the respondents, finding that the said deceased was determined to purchase *some* estate, and to prevent his making an injurious purchase, which might involve him, and his family, in embarrassment and litigation; as the said estate called the *Pastures* was an advantageous purchase, on consulting some of their friends, were advised to let the said deceased purchase the said estate; and the terms of the said contract having been settled without the said deceased taking any part therein, save as hereinbefore set forth, and the contract having been prepared for execution, the respondents admit," &c. &c.

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i. e. admit the actual purchase of the estate, &c. nearly in effect, as stated in the plea.

This "answer" was objected to upon the grounds, and for the reasons stated in the

#### JUDGMENT.

Sir JOHN NICHOLL.

This *answer* is objected to on the score of redundancy. Redundant, in some sense, it undoubtedly is; but the question to be determined is, whether it be viciously *so*. For the rest, I have always understood that answers were not confined to being mere echoes of the plea, accompanied with simple affirmances, or denials; but that respondents are at liberty to go into all matter not more than sufficient, in fair construction, to place the transactions as to which their answers are called for, in, what they insist to be, the true and proper light. And, in accordancy with this principle, instances have occurred within my memory in which where "*answers*" had been partially read by Counsel, I mean the answer to some one article, for instance, or position of a plea, the Court has itself directed other parts of the same answers to be also read; in order that the true course, as represented in the answers, taken as a whole, of that transaction, to which the answers, in that part of them read by counsel, immediately related, might appear in evidence. And this I take to be due less *ex gratia* to respondents, than to be what they are entitled to *ex debito justitiæ*.

Now if this be the true principle applicable to "personal answers," the exception taken to those before the Court can hardly be sustained. Who does not see that the transaction to which this *answer* re-

lates is placed in a very different light by the answer, to that in which it stood under the plea. The fact, *per se*, would undoubtedly be strong, to shew, not only that the deceased, at the date of this transaction, was a capable agent; but also, that he was so treated by the very persons now seeking to impeach his sanity. Accompanied with its history furnished in these answers, (and which the respondents are precluded from furnishing by no rule of law that I am acquainted with), it assumes, at least, a *different* aspect; though to what precise extent the suggested motive is a *satisfactory* explanation of the admitted fact in this instance, it is needless, at all events for the present, to inquire.

The objection, as I collect from the argument, founds itself upon this, that the matter excepted to should have appeared in plea; for, that appearing, as it does, merely in *answers*, it is matter to which the executors can have no opportunity of cross-examining. But this objection applies equally to every statement made in answers, and it is one which seems to me, for other reasons, hardly to be tenable. Extra articulate matter in a deposition is reasonably objected to on this principle, namely, as being matter to which no interrogatories could be addressed by the adverse, or objecting party. But then a deposition, if unobjected to, is evidence, in the cause. Answers only become so if read by the adverse party, which being at liberty either to do or omit, it rests with the adverse party either to make, or to exclude them from being, evidence in the cause by a very simple process. Nor does it materially alter the case in this respect, that the Court is privileged to look into the answers, even

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though unread, for it may be safely left to the Court's discretion to make all such deductions and allowances as the case requires; so as, in no instance, to attach any undue weight or influence, on the respondent's side, to *answers*, which, not being read, are not before the Court, strictly and properly, as evidence in the cause. Again, much of answers, perhaps, usually, the most stringent part, consists of matter which is not capable of being put in plea. All such matter, then, is admissible in answers; and yet is matter to which the other party has no opportunity of cross-examining. How, in this very case for instance, could the motives by which these parties were actuated, as they insist, in assenting to, or rather in not dissenting from, the purchase of this estate by the deceased, be put in plea? or, if put in plea, who was capable of deposing to them? But were the respondents bound to admit the fact without an accompanying statement of these motives? Certainly not. For all these reasons it seems to me that the answers are not viciously redundant in this part of them; and that I am bound to over-rule the present objection.

Objection over-ruled.

3d Session.

DOKER v. GOFF.

**J**OHAN GOFF, formerly of High Street, in the Borough of Southwark, a police officer, was the party deceased. He left a widow (party in the cause) and

A regular attestation clause without any subscribed witness, affords but a slight presumption against the legal validity of a testamentary paper, perfect in other respects: but that presumption is infinitely slighter where the writer's intention to have it regularly attested, is to be collected only from the single word "witnesses" at the foot of the paper.

Quære, whether a paper so circumstanced can, in all cases, be considered an unfinished paper so as to let in evidence against it? and note to what the evidence must (at all events, in some cases) be confined.

nine children. From the month of June, 1821, the deceased had been resident in Holland, whither he had gone in order to avoid being arrested by the creditors, to whom he had become liable as the *security*, of a person named William Goff; and where he died on the 28th of November, 1822: the deceased was accompanied to Holland by Elizabeth Smith Doker (the other party in the cause) with whom he had previously cohabited; and with whom he continued to cohabit, in Holland, until her return to this country, at the time, and under the circumstances, stated in the judgment. The question before the Court was, the validity of a paper, set up as the will of the deceased by this Elizabeth Smith Doker.

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The paper in question was as follows:

28 day of October 1821.

In the Name of God Amen.

I John Goff, of N<sup>o</sup>. 15 in Koe Straat in the City of Amsterdam in Holland formerly of the Bor<sup>d</sup> of Southwark in the County of Surry being of sound memory mind and understanding do make this my last Will and Testament here by from all former Wills and Testiments at any time heretofore made—in the first place I desire to be <sup>direction of my</sup> decently buried at the <sup>^</sup> Executrix Elizabeth Smith Doker my preasent Housekeeper and after the payment of my Funeral and Expences for Adminestration to this my last Will aforesaid to and all the debts I may owe at the time of my decease I give and bequeath unto Eliz<sup>a</sup>. Smith all my worldley Property.

the Last and only Will of John Goff.

Witness my Hand JOHN GOFF.

And that I the said John Goff doth nominate

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and appoint the said Eliz<sup>h</sup>. Smith Docker to be the Executrix to my Natural Daughter Louisa Daniels and that she Receives the sum of ten pounds per year from the Bank of England Invested in the Long Annuities, and if her Death should before the Termination of her Mother's Will hapen unto her that the said Eliz<sup>h</sup>. Smith Docker shal have every privelage <sup>said</sup> and Authority as I the <sup>to act</sup> John Goff had according to the said Will and that I have given her the full and extent power <sup>to act</sup> for her maintainance the the same as I had whilst I was living.

Witness my Hand JOHN GOFF.

dated 28 of October 1821.

Given und my Hand and Seals.

JOHN GOFF



JOHN GOFF



Witnesses.

#### JUDGMENT.

Sir JOHN NICHOLL.

The Court, in determining this cause, must be governed by the same principles as if the property at stake were more considerable (a): and by the same, it is sorry to say, as if the case set up on the part of the executrix, had a less unfavourable aspect than that with which it actually presents itself.

The deceased left this country in June, 1821, accompanied by this woman, Docker; with whom he

(a) Its probable amount was £600 or £700.



cohabited until March, 1822, when she returned to England, after much, mutual, altercation, not unaccompanied with some personal violence, on both sides; principally, it should seem, in consequence of the deceased having formed a connexion with a Dutch woman, named Blawmn, whom he picked up in Holland. After he had been in Holland four or five months, though, probably, before his acquaintance with this Dutch female, he wrote the testamentary paper propounded by Docker. Neither the handwriting of the paper, nor the testamentary capacity of the deceased, at the time of writing it, is questioned: the real and sole question is, whether the deceased did or did not consider it a finished and operative paper, *in its present state*. If the Court is bound to conclude it to have been such, in the deceased's view and apprehension of the matter, there is an end of the case. No proof of his having *intended* to make another will, or to dispose of his property differently, will, or can, in that event, avail to defeat it: and the Court will be bound to decree probate to the executrix; how inofficious soever this paper may be; and how repugnant soever it may be to the feelings of the Court to pronounce in its favor.

The first thing to be regarded is the form and appearance of the paper itself. It is a large sheet of thick paper; and such a one as a person might naturally select about to make a *final* disposition of his property. The date "28 day of October 1821," is twice written; it is twice sealed, one of the two seals bearing the deceased's initials, the other, a common device, but both seals appearing to have belonged to the deceased; it is signed by the deceased in five

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places. On the margin is also written, "the last and only will of John Goff." The purport of this paper is to give all the deceased's "worldly property," after payment of his debts and funeral expences, to Elizabeth Smith Doker, whom the testator appoints by it his sole executrix, and the guardian of his natural daughter, Louisa Daniels.

The will, of course, would have been *perfect*, if the testator had stopped here: but he has written, at the foot of the paper, the word "*witnesses:*" and this is the single circumstance, on the face of the paper, upon which it can be argued to be an unfinished paper. It is a circumstance, however, in my judgment, in the highest degree equivocal, in any case. Even a regular attestation clause, without any subscribed witness, affords but a slight presumption against the legal validity of any testamentary paper; and that presumption is infinitely slighter, and has always been so held, where the testator's intention to have it regularly attested is to be collected from the single word "*witnesses*" appearing at the foot of the paper. But in the present case that presumption is (nearly, if not altogether) rebutted by the following circumstances, for which the Court has not to revert to *extrinsic* evidence, but collects from the paper itself. In the first place the word "*witnesses*" is written so near the bottom edge of the paper, as hardly to leave room for witnesses to have undersigned it; and secondly, there are these words in the margin, "the last and only will of John Goff," which I must presume to have been the words *last* written by the deceased, as pleaded, although there is no direct proof of this. Nor is the deceased's condition, obviously an illiterate man, as

appears from the wording of the instrument, not to be taken into the account. Better general information, *à fortiori*, technical professional habits, might have founded a different inference: but nothing is, I think, more improbable than that *this* testator should conclude the paper in question imperfect from its not having been regularly attested, notwithstanding the *species* of attestation *clause* (if it can be so called) apparent on the face of the paper.

Upon these considerations, to which others might be added, as, especially, the *pains* obviously bestowed upon it, I have some difficulty in considering this an unfinished or imperfect paper, on the face of it—the only circumstance which can render parol evidence *against* it, admissible. At all events, under the circumstances, the parol evidence in this case, must, I think, be confined to shewing that the deceased himself did *not* regard this as a dispositive instrument in its present shape; but only as a preparatory will, or one in progress, merely, towards actual completion.

Now what is the case set up in opposition to this paper? In the first place it is pleaded, and witnesses have been examined to prove, that, subsequent to the date of the paper, the deceased and Docker had violent quarrels, which terminated in the latter finally quitting the deceased, and returning to this country, as I have said, in March, 1822. And several declarations are also pleaded and spoken to by witnesses (exclusive of some others which I shall notice presently), *that* “Doker should never have a sixpence of his money,” but *that*, “the whole should go to his wife and children,” or to that effect.

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Here, however, in the first place, the witnesses examined to these particulars speak with a warmth, and in a tone of evident exaggeration, which puts the Court on its guard against relying, too implicitly, upon their testimony. The conduct of the witnesses in this respect is natural, nor is it quite inexcusable. The widow, subsequent to her husband's decease, went over to Holland, and was received into the house of Mr. and Mrs. Binns (the principal witnesses to these particulars) with whom the deceased and Doker, then passing as husband and wife, had resided during the period of their joint residence in Holland. The subject of this will, and the deceased's whole conduct towards his family, was of course, and is admitted to have been, much canvassed between the widow and these parties: it was natural, consequently, that they should feel a warm wish to set it aside, as being a will made in favour of a prostitute, to the total exclusion of the deceased's lawful widow and children. There is one circumstance, in particular, indicative of this bias of the witnesses. They represent the deceased as professing himself, at all times, after Doker's departure, a penitent husband, anxious to efface the remembrance of his former conduct to his wife, by his future treatment of her: they do not say a word about the Dutch woman, Blawmn, with whom he was notoriously cohabiting, from the time of Doker's departure, till his death; and who appears to have been the principal, if not the sole, cause, of Doker's leaving him at all. The suppression of that fact alone would suggest to the Court the necessity of considering this part of their evidence with some grains of

allowance. But, after all, to what do the facts, and declarations, so spoken to, amount? Admitting these quarrels between the deceased and Doker, to any extent—admitting the deceased to have made the declarations, and to have been sincere in making them, (though, not improbably, he was insincere, and merely made them, supposing him *to* have made them, to reconcile himself to, and to ingratiate himself with, these people, the Binns's) they are both quite consistent with the deceased having considered this to be a finished will; in which case no change of intention, however probable in itself, or however probably deposed to, can have the slightest effect in defeating its validity; the deceased being admitted to have died without doing any other, or further, testamentary act. It remains also to be observed, that there are facts in evidence, at variance with the statements of the witnesses upon one of these heads in many particulars. For instance, it is in evidence, in spite of the *total* rupture between the deceased and Doker as *they* represent it, that the deceased furnished Doker with money for her expences, on her return to England; *that* he also gave her an order to a person with whom he had deposited a bed and some bedding, to deliver it up to her, for her use; *that* immediately upon her arrival in England, she took up her residence at *his* brother's, in compliance with the wishes of the deceased, where she continued to reside till after his death; *that* he made frequent inquiries respecting her welfare; and, *that*, on one occasion (in May, 1822) he sent her a note (which is exhibited) in which he says that he “freely forgives” and promises “not to forget her.”

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But the deceased is *also pleaded* by the widow, to have repeatedly declared that the will in Doker's possession was good for nothing—that she, Doker, had *stolen* a paper from him, purporting to be a will, but that the same was not witnessed, and that she could make no use of it to deprive his wife or children of his property. If this were so, it were something—these are stringent declarations, as pleaded, and come, at once, to the point. But the witnesses who depose to them are so inconsistent with each other, and are so flatly contradicted by the face and appearance of the paper before the Court (*a*), that it is quite impossible

(*a*) For instance, John Binns deposed that “a day or two before Doker left Holland, she produced to him, the deponent, a paper-writing, saying, “Mr. Binns, here's a will Mr. Goff has made, and if you and your wife will sign it,” (meaning, according to the deponent's impression, *as witnesses*) “it may come into use sometime.” This the deponent declined, saying, “he would not do it for all Amsterdam.” The paper so produced was not read by the deponent, nor, though acquainted with the deceased's hand-writing, can he depose to its having been written by the deceased. He remembers just looking at it to see if it was *signed*, which it was not: of that he has no doubt: he cannot swear that there was no signature to it, but he does swear that he saw none, and that he believes, that if the same had been signed he must have observed it.

Ann Binns deposed, that whilst at Rotterdam with Doker, whom she had accompanied thither just before her sailing for England, Doker, in her search for something at the inn there which she had misplaced, put her hand on a paper which she pulled out, saying, to deponent “here's a will of old Goff's; it is *neither signed nor sealed*, but it would have been good if I had been his wife; will you sign it?” On deponent's refusing, she said, “there are plenty of people in England who will, and it may be of use one day. I'll read it to you.” It began, “I leave to Eliza-

for it to place *any* reliance upon *this* part of their evidence. On the other hand, there are two persons

both Smith *Wayling*\*, my present housekeeper, all my property," &c.

And both these witnesses, Binns and his wife, deposed, that on subsequently acquainting Goff that Docker had got something of a will of his "he flew into a violent rage, and at first talked of sending a '*police man*' after her, but was quieted by reflecting, that it could be of no use to her from its not being *signed*," adding, "*he had put HIS HAND to no paper*. No," said he, "Jack Goff does not do so."

A witness named Jane Ribbing deposed, *that* some days after Docker had left Holland, Goff told the deponent (who had previously heard him say, that he had written *part* of a will, but would not *sign* it) that she, Docker, had got that paper from him, for he could not find it, but that it was of no use to her, for that it was not *signed*, nor sealed, nor witnessed. "Jack Goff," he said, "don't put his *name* to a paper."

And another witness, Benjamin Rolf, deposed to having been told by the deceased, "that he had made no will—that he had given a woman with whom he formerly cohabited, whom he called Mrs. Smith\*, a *false will*, being neither *signed*, nor sealed, nor delivered; which could be of no service to her; a copy of which he then shewed the deponent, who read part of it; but all that he remembers of the contents is, that it purported to bequeath certain property to Elizabeth *Wayling*\*, or a person of a name very similar to that.

It must be obvious, upon this evidence, that these witnesses were either deposing at random, or of some other paper, or were purposely deceived and misled either by Docker, or by the deceased himself; in any of which cases, as observed by the Court, their evidence could be of no avail to defeat the instrument *now* propounded by Docker.

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\* It is to be observed that, according to Binns's deposition, Docker had first passed as Mrs. Goff. After she knew her not to be Goff's wife, she passed by the names of Mrs. Smith or Mrs. Wayling. Binns says she never heard of her by the name of Docker, nor knew that to be her true name till after the death of the deceased.

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much in his confidence, examined upon Docker's allegation, who speak to direct recognitions, by the deceased, of this instrument, as an effective will, in Docker's hands. - In the course of a conversation between the witness Raitt, and the deceased, relative to the state of his affairs, in the May preceding his death, the deceased said, "I have settled all that; I have made my will:" and, on Raitt expressing some surprise at the deceased never having shewn it to him, he added, "I have it not: it is in England;" plainly alluding to the will in Docker's hands, for there is no vestige of any other. The evidence of the brother, George Goff, is even still more explicit: he speaks so having been told by the deceased, whilst on a visit to him at Rotterdam, in the September only preceding his death, that "Betsey had got his will." The words, he says, were, as he the deponent best recollects them, "I have made a will, and Betsey has got it with her." And I see nothing to justify the Court in repudiating the evidence of this witness, confirmed as it is by facts in the cause; though it might *otherwise*, for reasons that need not be stated, be entitled to little credence.

Upon these considerations I hold that I am bound by law, in deference, to established precedents, to pronounce this to be a valid will; and I decree probate of it, as such, to the executrix. And I also think that, in directing the expences of this suit to be taken out of the estate, I am bound to except those occasioned by the allegation given in on the part of the widow (which the registrar will ascertain in the best way that he is able); and which, I regret to say, must be borne *by* the widow.



## ROBSON and WAKEFIELD v. ROCKE.

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*(In the Goods of Thomas Charles Pattle, deceased.)***JUDGMENT.**

Sir JOHN NICHOLL.

This is a case of some weight and novelty, considered with respect to the magnitude of the property at stake, and the nature of the several proceedings in the cause—especially as viewed in connection with that (extraordinary) application which has been made to the Court, at the instance of *one* of the parties, since the cause was *concluded*. In order to furnish a distinct view of the case it is necessary that the Court should state, the history of the deceased and his several testamentary acts—an outline of the principal proceedings in the cause—the proof adduced in support of the instrument propounded—and the grounds upon which that proof is sought to be impugned. Upon the general result will depend the propriety of the Court's proceeding, at once, to a sentence; or of its opening the case to farther investigation in the manner, and for the reasons stated in that application to which it has just adverted; but of which it postpones, *accordingly*, a particular consideration, to that of the other parts of the case.

The deceased in the cause, Thomas Charles Pattle, died at Macao, in China, on the 26th of November, 1815; leaving a wife and one daughter, an only child. The amount of his property, which was wholly personal, is not precisely ascertained; but it may be safely estimated at 140 or 150,000*l*. He had been

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A will propounded—the direct evidence to the *factum* of that will stated, and held to be sufficient, corroborated by various facts and circumstances, to entitle it to probate, if not, itself, impugned and discredited in the strongest manner—attempts to impugn it by attacking, 1st, the character of the witness; 2d, the probability of the disposition; 3d, the genuineness of the signature, stated, and held to fail—the will pronounced for, and the opposing parties condemned in costs.

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many years abroad in the civil service of the East India Company; he came to England in 1802, but returned to China in 1805; attained a high station in the council of the factory of Macao; and died there, as I have said, in 1815. Upon going out to China in 1805, he left his wife and daughter in this country, where they continued to reside till his death.

Previous to this departure in 1805, the deceased made a will, which is before the Court, bearing date in April of that year. By this will he bequeathes his whole property to his wife and daughter. The deceased had also living at that time, a father, two brothers, three sisters, an uncle, Mr. Haselby, who attests this will, and numerous friends; but the will of 1805 has no legacy to any one of these. It is to be observed, however, that the deceased's property, at this time, amounted to, from between 10 to 20,000*l.* only.

It is in evidence that in the year 1814, the deceased had made, or said that he had made, another will, the substance of which is, in some measure, before the Court in Sir Theophilus Metcalf's affidavit of scripts. It will be sufficient to say of this, at present; that it should seem to have been a will in which his collateral relatives, and friends, were largely remembered; *probably*, about one-half only of his property, which had then very much increased, being given to his wife and daughter. Letters, too, are before the Court written by the deceased in January and February, 1815; the one to Mr. Haselby, the other to his friend Mr. Becher. In the former he tells Haselby, that he has given him 3000*l.* by his will; in the latter he tells Becher, that he has "put down" Haselby for 5000*l.* in his will; adding, that he should not object

to pay him interest, as on that sum, until his death puts him in possession of the principal.

At this time the deceased's health had begun to fail. Upon his return from Canton, (whither it was his duty to go *up*, as it is termed, at certain periods) to Macao, in the beginning of the year 1815, symptoms of dropsy, and water in the chest had appeared. In the summer, however, of that year, being something better, and having been recommended a sea voyage, he accompanied Captain Langford, of his majesty's ship *Alpheus*, to Manilla, whence he returned about the middle of August; Captain Langford kindly consenting, at some inconvenience, if not loss to himself, to return, *at once*, to Macao, on the deceased becoming suddenly much worse at Manilla. During this voyage to Manilla and back, the deceased was attended by the ship's surgeon, Mr. Edwards, and his assistant Mr. Allen, with the attentions of which latter he was so much pleased, that, on his return to Macao, he prevailed on Captain Langford to give Allen his discharge. From that time till his death Allen continued much about the deceased; occasionally writing letters for him, which the deceased merely signed, and so forth.

In the months of September and October preceding his death, the deceased's dropsical disorder, in the whole, increased upon him; though, like most dropsical patients, he was better sometimes, and at other times worse. His usual medical attendants at Macao were Messrs. Pearson and Livingstone, gentlemen attached, in that capacity, to the factory; but the first of these, Mr. Pearson, accompanied the factory to Canton in September (1815) and did not return

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thence to Macao till after the deceased's death. From September, consequently, Mr. Livingstone was his *sole* medical attendant.

In a letter written by Livingstone to the widow, soon after his death, accompanying a watch which the deceased had desired him, Livingstone, to forward to his wife if he did not recover, are the following expressions:—After entering into some particulars of his last illness, and stating, that he suffered little subsequent to his return to Macao, until his death, on the 25th of November, “with his mind powerful, and memory perfect, to the last,” except from “two severe attacks of difficulty of breathing,” indicative of water on the chest, the writer thus proceeds: “after one of these, which did not give way till all the usual resources of medicine had been tried, he had seen me a good deal alarmed; he inquired whether I considered him to be in much danger; I told him, frankly, that another attack might destroy him in an hour; he said, he was not afraid to die, but wished to have my real opinion, that he might have his affairs properly arranged; *this was on the 18th of October*; he informed me he meant to send for Mr. Croft, a law gentleman from Bengal, &c.” of course, though not so expressed, to assist him in such proposed arrangement. It is a will alleged to have been made by Mr. Croft, under these circumstances, dated the 20th October, 1815, that is propounded in this cause.

The contents and form of this will are briefly these: the interest of 20,000*l.* is given to the deceased's father, Thomas Pattle, for life, the principal, at his death, to the wife of the deceased; or, in the event of his father surviving *her*, to the daughter;

20,000*l.* are given to his wife, and 30,000*l.* to his daughter, on her attaining her age of twenty-one, absolutely; 15,000*l.* to his brother James Pattle; 5000*l.* each to his three sisters, Mrs. Rocke, Mrs. Mitford, and Mrs. Lay. The residue (after payment of these and other legacies; among which are 1000*l.* to Mr. Livingstone; 1000*l.* to Mr. (originally Pearson, but altered to) Shank; 3000*l.* to the two Mr. Ross's, father and son; and 1000*l.* each to his five executors) is directed to be equally divided and distributed between the children, of his brother James Pattle, and his sisters, Mrs. Rocke, and Mrs. Lay. Such, in substance, are the contents of this will. As to its form, it is written on two sheets, and occupies five sides, of large thick paper; there are several little alterations, the principal being the substitution of the name of Shank, for that of Pearson, which I have already noticed, on the third side; and the interlined additional bequest, on the fifth side, of a pipe of Madeira, to each of his executors—this latter is, evidently, written by the writer of the will—the name of “Shank” is written in a different hand, and with different ink—the instrument is subscribed, “Thomas Charles Pattle,” but there are *no* witnesses (*a*).

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(*a*) To explain this circumstance of there being no witnesses, Croft had deposed, that this was pursuant to *his* advice; he not conceiving it to be necessary, as the deceased had no real property; and as it appeared to him that having it attested might create unnecessary difficulties, there being persons in England who could easily prove the deceased's signature to it. “The possible difficulty,” he says, “which he, the deponent, contemplated was, that as the only persons who could be procured as witnesses were those resident in China, it might become necessary, in the event of there being a dispute respecting the will, to send out a commis-

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Immediately upon the death of the deceased, namely, upon the 26th of November, the day following, this instrument, such as I have described it, was found amongst the deceased's papers, in a sealed-up envelope thus indorsed, "the last will and testament of Thomas Charles Pattle, Esquire," addressed, "to Sir Theophilus James Metcalf, Bart.; George Templar, Hastings Nathaniel Middleton, William Frazer, and Charles Magnac, Esquires, executors; to be opened by either two of them that are in China at the time of my death." It is, accordingly, opened by two of the executors then in China, Mr. Frazer and Mr. Magnac; and they, at Canton, on the day following, the 27th of November, make an affidavit before Mr. Elphinstone, the chief of the factory, as to the plight and condition of the instrument when found; with respect to those erasures and interlineations, of which I have just spoken, still apparent on the face of it.

The will, with this affidavit and envelope attached to it by a sealed tape, is immediately sent to England; and brought into this Court, where probate of it is taken by two of the executors; the one, Mr. Middleton, being *sworn* on the 29th of May, 1816, and the other Mr. Templar, on the 21st of June, the month following. At first it should seem that the *body* of the will was supposed to have been *written* by the deceased: for when Mr. Allen, a friend of the deceased, acquainted with his manner and character of hand-writing attended *here*, on the 30th of May, 1816, as one of the two persons selected to authenticate the instruction to China, to examine them." He had before deposed that the only person actually present, was a half-cast Chinese woman; who did not understand English.

ment in that respect, (this being requisite prior to probate, *as* a will, of any unattested paper actually passing to the executors) he does, I make no doubt, very innocently, though somewhat too precipitately, subscribe and make an affidavit that "the whole body, series, and contents of," as well as "the signature to" this will, are of the deceased's hand-writing (*a*). And really, the *body* of the instrument propounded in this cause is written in a hand so similar to the *subscription*, in point of general character, that a person recognizing the latter by inspection, and making this sort of affidavit pretty much as a matter of form, without any circumstance whatever to excite his suspicions, or to suggest to him the necessity of any critical examination of the body of the instrument, might have fallen into this error very excusably. It is neither a circumstance of any great moment, in itself; nor does it seem to have excited any doubt or suspicion among the parties interested, *at the time*: for,

In June, 1816, the widow, on behalf of herself and daughter, filed a bill in Chancery; calling upon the executors to pay into Court the legacies due to them under this will, assumed, of course, to be valid. Accordingly, the sum of 70,000*l.* to which their legacies (that to the father inclusive) jointly amounted, was actually paid by the executors into that Court;

(*a*) On the attendance of Mr. Larken, another friend of the deceased, who, as proposed, was to join in Mr. Allen's affidavit, on the 16th of June (prior to Mr. Templar's being sworn) *he* discovered the mistake. His name accordingly was struck out of *this* affidavit, in which it was originally intended that he should join with Mr. Allen. And Mr. Larken was sworn to a separate affidavit, which went to the hand-writing of the subscription only.

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and the widow and daughter have, in consequence, enjoyed *their* share of the deceased's property bequeathed to them by this will, ever since the month of April, 1818. But in 1819, three years after, the probate is called in; and the executors are put, by these same parties, on proof of the will, *per testes*.

The daughter, however, though still a minor, had married a Mr. Wakefield in this interval; and he should seem, from what now appears, to have been the principal mover of this suit, to which he was party, as the guardian, and in right of his wife, from the very beginning. It is quite impossible therefore for the Court to consider him, in effect, as a mere intervener, although, formally, he does appear in that character; having been cited as the person upon whom *her* interest devolved, on the death of Mrs. Wakefield, in the progress of the suit. But it is manifest, from the whole course of the proceedings, that he is, and has been, from the very beginning, the effective party opposing this will: such I am bound to consider him, and, as such, principally responsible for the whole conduct of this cause. He it is who instructs the proctor: he it is who collects, I might almost say, instructs, the witnesses: it is on his behalf that the proctor and counsel *originally* retained in the cause are acting at the hearing; although Mr. Wakefield *now* suggests an interest separate from that of the widow, who, it should seem, had the *preferable* claim, at least, to their services; to which Mr. Wakefield indeed, in his character of intervener in the suit, could have no claim. I should say, that the widow, having married again, is the party, Mrs. Robson, and that the third party, Mr. Rocke, appears as guardian of the resi-



duary legatees, in the room of two of the executors in whose name it was commenced; but who have died in the course of this suit. I must here too observe, that this suit has occupied nearly four years, as the first allegation, or that propounding the will, was given in in February, 1823. Where the blame of this lies, I do not, at present, stop to inquire. I notice it, principally, in order to protest against the time which this suit has occupied, being deemed the fault of this Court, or of its forms: it might have been brought to a hearing, for any thing that appears to the contrary, in one-fourth of the time, if the parties had wished it.

Having thus furnished a general outline of the case itself, and the proceedings had in it, it now becomes time to inquire, whether the executors have answered the demand which has been made upon them to prove the *factum* of this will, in a satisfactory manner—taking into consideration, the time, and the circumstances under which they are so called upon, and the following circumstance in particular.

Upon the first allegation, that propounding the will, being given in by the executors, they applied to the Court for a requisition to China in order to examine witnesses *there* upon it; which application was resisted by the parties opposing the will, on account of the expence and delay which it would occasion, in common, to both parties. To that application, so resisted, the Court, under the circumstances, refused to accede: but in refusing, it did so upon this special implied condition, namely, that the case on the part of the executors should be fairly met by their opponents, and that secondary evidence, to some extent, in favour of

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the will, should be acquiesced in, on their parts, as the executors were deprived, in all probability, of primary evidence in its favour, solely in consequence of the Court's acceding, in effect, to their own prayer. This is a circumstance not to be lost sight of; and it accounts for the evidence in favour of the will being, in some parts of it, less stringent than it otherwise, *probably*, would have been. For instance, Mr. Livingstone's evidence to the instructions, No. 2, and that of other witnesses to many, not unimportant parts of the case, would, probably, have been had, if the widow, and next of kin, had made no objection to a requisition going out to China, as prayed by the executors, in the first instance.

I now proceed to the proofs furnished by the executors, under these circumstances, of the *factum* of this will, the only direct witness to which is the writer of it, Mr. Croft; being *the* "Mr. Croft, a law gentleman from Bengal," whom Mr. Livingstone had mentioned in his letter to the widow, that the deceased proposed *sending for*, on suspecting that his illness might terminate fatally.

It seems that just about this period, or in the beginning of September, 1815, Mr. Croft, accompanied by his wife, had arrived at Macao from Calcutta, in the course of a voyage undertaken for the benefit of Mrs. Croft's health. He had become acquainted, at Calcutta, with Mr. James Pattle, the deceased's brother, and was the bearer of letters from him to the deceased, among which was a letter of introduction for himself and Mrs. Croft. The deceased was too ill to receive them into his own house, but he placed them in that of Sir Theophilus Metcalf, then at his dispo-

sal, in consequence of its owner's absence from Macao, where they resided till the beginning of November (a). During this interval Croft (the husband) often called upon the deceased, who admitted him or not according to circumstances; the length of his visits being regulated by the state of the deceased's health and spirits at the particular times when they happened to be paid.

The following is the history, as furnished by Mr. Croft in his deposition, of the *making* of this will. On the evening before the will was executed he is sent for—he finds the deceased labouring under a great difficulty of breathing; apparently almost at the last gasp; but he soon recovers so far as to be able to converse—the deceased then tells him that he has sent for him in order to draw up his will—Croft answers, that, not having his books with him, he will not undertake to draw it up, technically, and professionally; but will write it, as a friend, from his dictation—the deceased assents to this, and desires him to sit down and write, accordingly. A paper is then written by Croft, from the deceased's dictation, which, having been read and approved by the deceased, is taken away by Croft, in order that he may copy it out fair for execution. In the course of the evening he receives two additional instructions (b), which I shall presently notice; with which, and those taken as above, he proceeds to prepare the instrument in question. On the following day he carries it to the deceased, to, and by, whom it is read over—some corrections are made in it, at his own suggestion; and the

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(a) Croft himself was absent about a fortnight of this time, having gone to Canton. Canton is distant about 60 miles from Macao.

(b) See note (a), page 72, *post*.

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deceased finally executes the instrument, being, at that time, in a state of perfect capacity. When executed, the will is left in the deceased's custody, who saw Croft several times after; but made no further observations to *him*, on the subject of it. He had quitted Macao, on his return to Calcutta, about a fortnight or three weeks, when the deceased died.

The above is a mere general outline of Croft's account; but it warrants an assertion that, in that account itself, if credible, the Court is furnished with direct proof of the *factum* of this instrument; or, in other words, it is furnished with direct proof that this instrument was drawn up from instructions given by the deceased, and that it was executed by him, being, at the time, of sound and disposing mind and memory. As to this last particular, indeed, it may be observed, once for all, that no doubt has even been suggested with respect to the deceased's perfect *capacity* at this period: he survived this transaction five weeks; and it is in evidence, from a host of witnesses, that he was fully capable to the last; and that his mind, to the last, was as much alive as it had ever been.

Such, then, is the direct, positive, evidence to the *factum* of this will. In confirmation of it, we have,

1st. The finding of the instrument, as already described, immediately upon the death of the deceased in a sealed-up envelope; one of the seals used bearing, I observe, the deceased's crest and cypher. And this a fortnight or three weeks after Croft, the writer of the instrument, had quitted Macao.

2dly. There are five old, and intimate, friends of the deceased, attesting the genuineness of the signature—persons well acquainted with his hand-writing, from

his correspondence, both private, and official—forming that opinion and belief, not upon a hasty and casual inspection, but after doubts had been raised as to the genuineness of the signature—assigning, as their *ground* of opinion and belief, its perfect resemblance to the deceased's *usual* signature in that peculiarity of character, which belongs to, and distinguishes, the hand-writing of most individuals. Evidence to hand-writing is, at best, inconclusive; but of that species of proof, I will say that the witnesses here produced, have furnished as strong, and as satisfactory, a sample, as well could be furnished. These circumstances, in conjunction with others which will naturally disclose themselves in the progress of this inquiry, so corroborate the direct evidence in favor of this will, that unless that evidence be impugned, and discredited, in the *strongest* manner, the will itself is fully established.

The opposers of the will have endeavoured to subvert the force and effect of this evidence in several ways. But their counsel have principally argued and objected, in order to this: 1st. The character of the witness, Croft, which they have represented to be such that the Court can place no reliance upon his evidence; especially none, in favor of such a will, which: 2dly. they have maintained that hardly *any* evidence could sustain, from the improbable mode in which it purports to dispose of the property of the deceased: 3rdly, and lastly, they have contended that, independant of all this, the pretended signature to this will is *proved*, (as it was expressly alleged) to be a forgery, and not of the hand-writing of the deceased; which if it be proved, then, of course, there is an end, both of Croft's evidence, and of the whole

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question. It is necessary therefore that the Court should examine, briefly, each of these several grounds of objection.

1. And here in the first place it is to be observed, in estimating the credit due to this witness, Mr. Croft, that his *general* character has not been put in issue: no plea has been given stating, no witness has been produced to depose, that he is a person not fit, from his general character, to be believed upon his oath. His moral character in a *particular* transaction has been attacked, through the medium of interrogatories addressed to him; and pretty successfully, as far as that transaction goes. It appears, by his answers, that he had married, in this country, a daughter of Sir Edward East, whom he accompanied to India on his being appointed Chief Justice at Bengal, in 1813. At Calcutta he entered into partnership with Mr. Cumberbach an attorney, and continued in partnership with him till 1816. The will in question was made in 1815; up to which period, and until long after, Croft's moral character stood unimpeached; so that nothing at that time, apparently, pointed him out as a fit instrument to be selected for the commission of a gross fraud and forgery. In 1818, however, it appears that he, a married man, resident with his wife at Calcutta, seduced a young woman, only 19 or 20 years of age, the daughter of his former partner Mr. Cumberbach—a case of seduction, it is true, attended with some circumstances of great aggravation. The father brought his action for this, and recovered heavy damages; and Mr. Croft left India and returned to Europe. Now what, or whether any, *palliatives* to this grossly immoral conduct on his part existed, as in the lures and temptations thrown out

by the young lady, or otherwise, I shall not stop to inquire: it can admit of little excuse, and of no justification. But that the Court should *presume* him, *from* this one transaction, capable of committing a gross act of fraud and forgery, two years before, and of supporting it by as gross perjury, two or three years after, is a proposition, which I am bound to withhold my assent from both by law and reason. Mr. Wakefield's Counsel have contended that the witness, Croft, is to be swept out of the case: *that* however is going a length to which the Court is quite unprepared to follow them, upon any such grounds as they have stated: at the same time he is certainly not a witness *omni exceptione major*; he is, to a certain degree, tainted. The Court therefore will resort to other criteria than *his* mere oath of the integrity of this whole transaction relative to the will in question; and will briefly consider what confirmation his statement respecting it derives, as well from admitted facts and probabilities in the case; as upon other considerations fairly applicable, as tests of the credit due to the account given of it by this witness in particular.

Among these *other* considerations a first, and not the least material is, that the deposition of this witness itself, which is long, and special, carries with it strong internal marks of truth and fairness. So far as the Court is enabled to judge, it presents a candid, unreserved, undisguised relation of *facts*. He is called to speak to this transaction, nearly five years after it had taken place; it might well be that in that interval some of the particulars had escaped his recollection altogether, and that others, once forgotten, would revive, as circumstances connected with them gradually sug-

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gested themselves to the witness. This alone would be sufficient to account for the statement of a transaction so remote, being, to some extent, erroneous, and confused. The memory of this witness may, not improbably, be a treacherous one. It is also to be remembered that means have been resorted to of betraying him into inconsistencies, or contradictions, to speak the most favorably of them, a little extraordinary. He had been questioned in a very unusual manner (not to say intentionally tampered with) by the opposers of this will, at the outset of the cause. The Court alludes to a letter addressed to Croft in December, 1819, by Mr. Wakefield; and conveyed to him at Marseilles, where he then resided, not by the ordinary conveyance of the post, but by a special messenger, Mr. Humphries, an attorney (who afterwards travelled with the witness from Marseilles to Paris); a letter consisting not merely of general inquiries, but making up a set of special interrogatories containing a pretty strict cross-examination of Mr. Croft relative to all the circumstances of this long by-gone transaction. Now, first, as to this mode of proceeding, it is one in my judgment very objectionable. Croft was the alleged writer of the will; a witness whom the executors must have been expected, and indeed whom they were bound to produce. General inquiries of him as to whether he, in truth, *was* the writer of the will, and as to whether the deceased gave him instructions for it, and subscribed it, and was in a state of testamentary capacity at the time, might not be improper, even in the projected opposers of it; in order to determine them as to whether, and to what extent, they would persist in their projected opposition. But to require written answers to a long



string of interrogatories as to such a transaction, of the nature of those addressed to this witness, and before he had seen the original papers in the cause, was a course of proceeding, neither very *usual* I repeat, nor, very proper; although the court is willing, in candour to acquit the writer of this letter of any improper intention at that time. What however has the result been? The witness not only apparently in the most unreserved manner, returns a full general answer by letter to that so addressed to him; but he also answers distinctly, in writing, all the queries in the several interrogatories, as far as his recollection then served him. And this letter, and these answers, are now introduced into the cause, in order to discredit the witness, as by reason of variations between them, and the deposition. After all, however, to what do those variations amount? Upon my mind, candidly and impartially considered, they produce, for reasons presently to be stated, a quite contrary effect to that for which they have been invoked into the cause.

These *answers* of Croft confirm as fully, in substance, the *factum* of this will; or in other words, that it was written from the instructions, and that it was subscribed by the hand, of a capable testator; as the deposition: the *principal* variations are these: in the answers it is said, 1. That the instrument was completed and signed at one sitting: 2. That the daughter had a legacy of 50,000*l.* and was also the residuary legatee. It seems that this statement was erroneous in both particulars; accordingly a correct statement, and consequently one varying from the above, in both particulars, was given in the deposition, of which an abstract has already been furnished,

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Now as to this first variation, the witness does not suppress, that his impression, at the time of his answering Mr. Wakefield's queries, was, that the instrument was completed at one sitting. He candidly admits this upon his examination in chief, and says, that "he could not have *deposed* merely from *unaided* recollection, that the will was not *then* signed; and that what he then wrote (namely, from the deceased's dictation, as above) "became the draught of his will; for the impression upon his mind was, that such had been the fact, till in the month of March *last* (i. e. in the month of March, 1820, for this witness was examined in the July of that year) copies of the instructions (i. e. the two *additional* instructions sent to the deceased in the evening of the day when the instructions, as already stated, were taken) were shewn to him by Mr. Gatty, Wakefield's solicitor, at Paris; and they refreshed, and corrected, the deponent's memory, so as to enable him to depose, &c." that is in brief, as already stated in the abstract of his deposition. The witness speaks to the same effect, only with greater particularity, in answer to the third interrogatory, with every appearance of fairness and candour, and which the Court sees no reason to distrust, even after all that has been urged in objection to the credit of this witness.

An explanation equally satisfactory is given of the other variation. He says, in answer to the third interrogatory, "the respondent did, in his letter to Mr. Wakefield, state the impression upon his mind to be, that the legacy to the daughter was 50,000*l.*; which he stated, as he did every thing else, from recollection; and, by referring to the will as he has

*now* an opportunity of doing, he sees, very plainly, how the misconception arose, she having an absolute bequest of 80,000*l.* and a contingent bequest of 20,000*l.* She was therefore to have, eventually, what he, rather erroneously, stated her (as he then believed her) to be entitled to, absolutely." He admits also having stated, according to the then impression of his mind, that the daughter was the *residuary* legatee. The account which this witness gives of his communications with Sir Theophilus Metcalf, in answer to this same fifth interrogatory, as to the erasure of Pearson's name and the substitution of Shank's—his not attempting to account for this, &c. (not to advert to it more particularly) has every mark, to my mind, of truth and fairness.

As to Croft's mistake indeed, with respect to the disposition of the residue, so far from impeaching the credit of his general narrative, it goes far to confirm it, in my judgment. Taking this transaction to have passed in mere ordinary course, as the witness relates, there is nothing unnatural, or improbable, in Croft having forgotten, after an interval of four years, to whom the residue was bequeathed by this will. It was a matter of no moment or interest to him; nor is it at all surprising that it should have made no deep impression upon his memory. But on the other hypothesis, on the supposition of this being a fraud on the part of Croft, in conspiracy with some *other* person or persons, its main object must have been to deprive the daughter, then Miss Pattle, of the residue. And that Croft could possibly have so far forgotten the main object of the fraud, as to hold out to Wakefield that *his* wife was the residuary legatee, at any time, is a circumstance so improbable, that this very mistake

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is a strong confirmation of the transaction having actually passed, as he describes it.

Thus far, then, the attack upon the credit of this witness fails in its object. Admitting him however to be so shaken in credit as to require even all that *corroboration* which an accomplice requires, examined upon a criminal prosecution, still, in my judgment, the testimony of this witness *has* that corroboration. Some of the numerous corroborations which it derives, as well from the *res gesta*, as from the testimony of other witnesses, have already been adverted to. Again, that the deceased made a will at this time, through the agency of Croft, must be admitted from Livingstone's letter to the widow. It is in evidence too, not only that soon after the making of the will, such was *generally reported* at Macao to be the fact, but that, it was mentioned, specifically, to Mr. Ross at the time, as that gentleman deposes, by Croft, by Livingstone, and he, Mr. Ross, *thinks*, by the deceased himself. Again, as to the *contents* of the will, the pencil instructions, No. 1, are proved to be in the deceased's hand-writing; as the instructions, No. 2, are proved to be, partly in the hand-writing of the deceased, and partly in that of Mr. Livingstone (*a*). Accordingly,

(a) These instructions Nos. 1 and 2 were as follows:

No. 1.

" Please to add

" £1000 to A. Pearson.

" Ditto to J. Livingstone.

" All my goods and wines to be sold for the general purposes of my will, except a pipe of Madeira to each of my executors.

" T. C. P."

No. 2.

" I hereby empower my present attorneys George Templar and Hastings Nathaniel Middleton, esquires, to sell all my stock in

the bequests and directions furnished by these instructions are embodied in this will. Both these instructions, I should say, were carried by Croft to Bengal and preserved; nor are they produced by him, as to corroborate his own evidence, *now* that the will is questioned, but they were delivered by him to Sir Theophilus Metcalf in the following year at Bengal; when inquiries were made about the substitution of Shank's name, for that of Pearson; and he, Croft, should seem to have actually forgotten their existence, till copies of them were shewn to him, in 1820, by Mr. Gatty, at Paris. If there be any fraud then, Livingstone must be a party to it: as also must Allen, for the name of "Shank," and the indorsement on the envelope, are now proved to have been written by Allen. In short, so strongly does all this corroborate the evidence already stated, furnished by Croft, as to the immediate *factum* of this instrument, that the adverse parties have been constrained to meet it by setting up, in fact, a new case, almost at the hearing, which I shall advert to presently; equally unfounded however, as that originally set up, either in proof, or in probability.

2d. It has been attempted however to be maintained in argument, secondly, that the dispositive part

the 3 per cent. consols, and East India Stock, for the general purposes of my will.

" 19 Oct<sup>r</sup>. 1815.

" THO<sup>s</sup>. CHA<sup>s</sup>. PATTLE."

" MY DEAR SIR,

" Mr. Pattle wishes the above clause to be inserted in his will, because at present his attornies have no power to sell, only to receive and reinvest.

" Your's truly,

" JOHN LIVINGSTONE."

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of this will is so highly improbable, as to present a nearly insuperable obstacle to its being considered the deceased's own act. Let us see upon what foundation that argument rests, or in other words, whether the dispositive part of this will has any thing of that "high improbability" sought to be ascribed to it.

The deceased had a wife and daughter—an only child. Towards his wife, more has been said of his fondness, than could be of his fidelity, for his conduct in that particular does not seem to have been quite pure. The truth and sincerity of his love for his daughter, admit of no doubt: he was particularly attentive to her education; and constantly expressed himself, when speaking or writing of her, in the warmest and most affectionate terms. Now it is said that the amount of property left away from this only daughter is so improbable, as to furnish, of itself, a serious obstacle to the alleged validity of this will: and, by way of heightening this improbability, the Court is reminded that the deceased had made a will, leaving to his wife and this daughter his whole property, in 1805.

Now here, in the first place, does it at all follow, that, because the deceased left his wife and daughter his whole property, consisting of from 10 to 20,000*l.* in 1805, he should also leave them his whole property, consisting of from 140 to 150,000*l.* (after a ten years separation from them) in 1815? I see little or no connexion between the two propositions, the one of which has been assumed as the so probable consequence of the other. The deceased might think in 1815, as many persons do who have acquired *large* fortunes abroad, that his collateral relations had, *then*, some

claim upon his bounty. He might think his daughter amply, and more safely, provided for by a part of his large property in 1815, than by a bequest of the whole. There could be no room for such considerations in 1805, when his whole property was at least ten times less in amount; and not more than sufficient to leave his wife and daughter decently and comfortably provided for; which I must presume to have, always, been his first object.

Again, the circumstance of there being no legacy in this will to his uncle *Haselby* is said, by the opposers of the will, to be nearly incompatible with its genuineness; the more especially as the deceased had mentioned, in letters of January and February, 1815, that he had "put down" *Haselby* for 3 or 5000*l*. Now such "declarations" as they have been termed, are the slightest circumstances possible in a case like the present, either in favor of, or against a will. The letters in question, are dated in January and February, 1815; in the course of that year the deceased had earnestly and repeatedly pressed *Haselby* to come out to China, which *he* had declined. *This* might induce him to alter his mind, and omit *Mr. Haselby*. But the very evidence produced by the opposers of the will, in order to shew the improbability of *Haselby's* omission, does, incidentally, by a consequence of which probably they were not aware, render the general tenor of this will, as to the dispositive part of it, by no means incredible. It proves that even in 1814, the *principle* of the will of 1805, had been departed from; and that the deceased had given, or intended to give, *considerable* legacies, *away* from his wife and daughter. Nor is it at all improbable

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that a testator who bequeathes 3 or 5000*l.* to *an uncle*, should endow his brothers, sisters, and their families, with even as liberal a portion of his testamentary bounty, as is purported to be conveyed to them by this obnoxious will.

Observations of a similar import apply to another similar argument, only with still stronger effect, inasmuch as the “declarations” upon which it is founded are of a much looser texture. The deceased, it seems, had promised Captain Langford to “do something for his son;” a promise which I admit, as insisted, that he never performed, provided this is to be taken as his will. But a circumstance of this nature is a mere feather, if placed in the scale, as a counterpoise to that weight of evidence by which this instrument is authenticated. The deceased, in making this promise might have been insincere; or he might have altered his mind; or he might have forgotten it. It was likely that there should be such a legacy in his will: but is there *not* being so unlikely as to assist materially in proving this, or any, will said to be his, to be a fabrication, and a forgery? I am of opinion that it is a circumstance too trivial and remote to have any such effect whatever.

But since the opposers of this will, in their zeal to impress on the Court the improbability of the dispositive part of it, have thought fit to refer it to *some* testamentary dispositions of the deceased in 1814; those who defend it are surely at liberty, by way of rebutting that inference, to refer it to *other* testamentary dispositions of the deceased, of nearly the same date, which are before the Court, if not in strict formal proof still in my judgment sufficiently in proof



to justify *this* use of them on their part. At all events, they are sufficiently in evidence for the *Court* to avail itself of them, in order to ascertain whether the dispositive part of the will now propounded really is so utterly improbable as its opponents would represent it. I allude to the paper marked (A) annexed to the affidavit of scripts of Sir Theophilus Metcalf.

It appears that in June 1814, the deceased shewed Sir Theophilus Metcalf a memorandum which he had written in the blank page of an "Encyclopædia" consisting of sums and initials; being, as he said, an abstract of the legacies contained in a will, which he, the deceased, had then lately made. This Encyclopædia was afterwards given by the deceased to his friend Captain Ross, and the paper in question was copied, in 1817, by Sir Theophilus Metcalf, from that book (a). Among others is Mr. Haselby's legacy of 3,000*l.* Most of the legacies correspond in amount with those in the will now propounded. Some are enlarged—the legacy

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(a) The script, paper (A), was the copy so made by Sir Theophilus Metcalf of these sums and initials; over against which were placed the names of the persons to whom he conceived the initials to allude, in the following manner:

" 10,000*l.* J. P.—His brother, James Pattle.

" 5,000*l.* S. R.—His sister, Mrs. Rocke.

" 5,000*l.* E. M.—His sister, Mrs. Mitford, &c."

Sir Theophilus Metcalf had sworn *that* "being well acquainted with the family and friends of the deceased, he was enabled, as well from a perusal of the said memoranda, as from the explanation which the deceased himself had given to him of the meaning of the same, to ascertain all the persons to whom the several initials applied." At the head of this paper was the sum of 60,000*l.* without any initials: opposite to which was written by Sir Theophilus Metcalf, "*This* sum, I conceive, was meant for his wife and daughter."

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for instance, to the brother, Mr. James Pattle, is enlarged from 10 to 15,000*l.* Probably the deceased's property had increased between April 1814, and October 1815. The sum of 60,000*l.* is put down without any initials; but as neither the father, wife, nor daughter, are noticed in this abstract, this sum of 60,000*l.* (made 70,000*l.* in the will) was clearly intended for them. The disposition of the residue is not mentioned; nor was the deceased himself probably aware, even nearly, of its *exact* amount. It is in evidence that, only very shortly before his death, he was under great uneasiness as to a considerable sum due to him from a person named Beale, who subsequently became a bankrupt; though not, I think it appears, until after the deceased had obtained payment of his debt. It might be very difficult, under these circumstances, for the deceased himself to calculate what the residue of his property, at any given time, would actually nett to those persons selected for his residuary legatees.

Now it should seem, upon the general result, that the legacies minuted in this abstract amount to about 114,000*l.* of which only 60,000*l.* seem to have been intended by the deceased for his father, wife, and daughter: being nearly in the same proportion to what *then*, probably, was his whole property, as the bequests to them under this will bear to his whole property at the time of his death. If then to conjectures upon loose probabilities as to the dispositive part of this will, this abstract, made by the deceased himself, of the will of 1814, may be opposed with any sort of propriety, the whole inference, slight as it is, arising from the asserted improbability of the dispositive part of it, stands completely refuted. I term it a slight inference, and upon general principles, for this reason. All presump-

tions either for, or against, an alleged will, arising from the particular disposition which it purports to make of the deceased's property, are but vague and loose, at the very best; inasmuch as, the varieties of human opinion, as to what is, or is not, a fit disposition of property by will are almost infinite.

3. I proceed, thirdly, to the evidence in proof of the direct charge of the signature to this instrument being a forgery.

This Court has often had occasion to observe, that evidence to hand-writing is at best, in its own nature, very inconclusive; affirmative, from the exactness with which hand-writing may be imitated; and negative, from the dissimilarity which is often discoverable in the hand-writing of the same person, under different circumstances. Without knowing, very precisely, the state and condition of the writer at the time; and exercising a very discriminating judgment upon these; persons deposing, especially, to a mere *signature* not being that of such or such a person, from its dissimilarity, howsoever ascertained, or supposed to be, to his usual hand-writing, are so likely to err, that negative evidence to a mere subscription, or signature, can seldom, if ever, under ordinary circumstances, avail in proof, against the final authenticity of the instrument to which that subscription, or signature, is attached. But such evidence is peculiarly fallacious, where the dissimilarity relied upon, is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position—as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined—nay, the materials,

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as pen, ink, &c. being different at different times—are amply sufficient to account for the same *letters* being made variously at the different times by the same individual. Independant, however, of any thing of this sort, few individuals, it is apprehended, write so uniformly, that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person. Of the deceased, at least, the hand-writing was *not* so uniform as to render such dissimilarity a test (and it is the one principally relied on) safely applicable to the proof of this signature being a forgery. The Court has before it thirty letters written by the deceased, when in perfect health, and even finely written. The body, in a small, fine, rapid hand; the signatures, larger, but still in a masterly hand. Yet in the formations of the particular letters, especially those composing the signatures (nay, in the signatures themselves) nearly every sort of variety occurs. Sometimes the deceased signs “Thos. Chas.” sometimes “T. C.” only. And the particular letters, especially the initials “T. C. P.,” are as various as can well be conceived in their particular formations. Subject to these preliminary observations, I address myself to the direct proof of this signature being a forgery—only *further* premising, that if Courts, from their experience, have always been in the habit of expressing suspicions of the nature which I have described as to evidence upon hand-writing, generally, there never was a case tending to justify, and confirm those suspicions, more strongly than the present.

The best, usually perhaps the only *proper*, evidence of hand-writing, is that of persons who have acquired

a previous knowledge of the party's hand-writing from seeing him write, and who form their opinion from the general character and manner of this, and not from criticising particular letters. Of this class of witnesses only three are produced to prove this signature a forgery, namely, Lord Torrington, Mr. Drummond, and Mr. Baring.

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The first of these, Lord Torrington, had not seen the deceased subsequent to 1810, or 1811; and what does he say? "He cannot depose that he believes the signature *not* to be of the hand-writing of the deceased." He admits, however, having been told by Major Robson that "very great doubts existed as to whether the signature were not a forgery;" and yet, deposing under the prejudice which these suggested doubts would naturally give rise to, "he will not venture to say that he believes the signature not to be that of the deceased in the cause:" there is such a "similarity of character," he cannot depose that "he believes the signature *not* to be his." It has been truly, I think, insisted, that this is evidence rather favorable, than adverse, to the genuineness of this subscription.

Nor is the evidence of Mr. Drummond, the second witness, in its general effect, very dissimilar: for he cannot take upon himself to depose that he does *not* believe the signature to be the hand-writing of the deceased: "he can only depose," *for reasons stated* "that he has doubts:" he admits that the signature, "at first view, does appear, in his judgment, to have the character of the deceased's subscription." What then are the reasons upon which this deponent rests his doubts? I should first however premise, that

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Mr. Drummond had not seen the deceased write after 1807; and that he too had been told, like the first witness (namely, by Mr. Wakefield) that the signature in question was believed to be a forgery.

According, then, to his *recollection*, the final "ss" of the christian names "Tho<sup>s</sup>." and "Cha<sup>s</sup>." were usually made by the deceased without any curve inwards at the foot; and the capital P, in the surname Pattle, in one connected flourish, i. e. with a double loop at the bottom. The signature differing from the deceased's usual signature (according to his recollection) in the particulars, is the ground upon which this witness's doubts are founded.

Now here in the first place, as to the capital P., I have already observed, speaking of his letters, that the deceased made his capitals in a variety of different ways. But will it be believed that of his signatures to three exhibits annexed to the very allegation upon which the witness is deposing, the P, in Pattle, is made, in no one instance, in the mode suggested by this witness, as the *usual* mode; but that they are all in the same form as in the signature to the will? As to the final "ss," the deceased, being manifestly a rapid writer, made his "ss" more frequently by a mere dash of his pen, without curving inwards at the foot, though there are many instances to the contrary, in most of the exhibits. Nay, here again, in the very first of the three exhibits annexed to this allegation, the final "s" in the "Tho<sup>s</sup>." is written in the one of these modes; and, in the "Cha<sup>s</sup>." it is written in the other. So extremely fallacious are the criteria sought to be relied upon. I will only further observe, on this head, that of the two allegations given by the

opposers of this will, there being three exhibits annexed to the first, and two to the second, the signatures to the three former, are as dissimilar to those to the two latter, exhibits, as can well be imagined. The three former are signed "Tho<sup>s</sup>. Cha<sup>s</sup>. Pattle," in a beautiful hand—the two latter are signed T. C. Pattle only; and this, hardly legibly. The deceased then was obviously not so *uniform* a writer, that observations of this sort can be much depended upon.

The third witness, Mr. Baring, is more positive—he does venture an opinion to this signature being a forgery: he participates in the scepticism, and, to some degree in the confidence, of those witnesses who, from their skill in hand-writing *alone*, (as I shall presently observe) arrive, unanimously, at the same conclusion. Indeed, it may be well questioned whether Mr. Baring does not more properly belong to this latter class of witnesses, than to the one in which I am considering him. He is, evidently, a witness who plumes himself as a judge of hand-writing, generally—of the deceased's hand-writing, in particular, he has had little knowledge, nor had he *seen* the deceased write, subsequent to 1801. At best, however, his knowledge of the deceased's *particular* hand-writing, was slender and remote—his prejudices against the signature were recent, and, probably, strong: for he admits that Mr. Wakefield had, previous to his examination, affirmed to him, "that the will would be found a forgery." Now what are the reasons by which Mr. Baring fortifies his belief as to this signature being, what it was so asserted?

His first reason is that the signature is not in the same hand-writing as the address on the envelope. So

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far he happens to be right : but who ever said that the address on the envelope was written by the deceased ? Not the propounders of this will, at any time ; though the opposers, at one time, did, namely, just so long as suited their own purpose. The indorsement on the envelope is now admitted, on all hands, to have been written by Allen. Meantime, of the professional gentlemen, if I may so term them, deposing to hand-writing, of whom I shall say more presently, there are several who depose that the signature is in the *same* hand-writing as the address. So that we have this curious feature in the case. Mr. Baring, who deposes to his belief of this signature being a forgery, under an impression that the address on the envelope *was* written by the deceased, assigns, as one of his reasons for that belief, the “signature” being in a *different* character from the “address.” Other witnesses, again, who depose to the same belief, under a conviction, that the address on the envelope *was not* written by the deceased, assign as one of their reasons for that belief, the “signature” and “address” being written in *one* and the *same* character.

His second reason is that “the top of the T, in Thomas, is of a greater length than the deceased was accustomed to make, or ever made it, in the days of his best writing.” It might be sufficient to say that this “T,” does not purport to have been made “in the days of his best writing.” The deceased was in bed, and sick, and feeble ; which might well, of itself, account for this “T,” differing from those which he made “in the days of his best writing.” Thus it should seem, that the reason were frivolous, though the fact were true. But there is some reason to believe that the witness is



mistaken in his premises, as well as erroneous in his conclusion. The objection is, that the flourish at the top of the "T" in "Thomas" is too long: it extends however only to the first small "t" in the surname of Pattle. Now in the signature to the very first exhibit annexed to the opposer's allegation, the flourish is longer, actually extending two letters beyond, that is, to the "l" in "Pattle," instead of merely to the first "t."

The next reason is, that this same "flourish," is too firm, to be consistent with the *tremulous appearance* of the remainder of the signature. This is surely too weak a reason for serious discussion; not to mention that in his opinion, of the "*tremulous character*," at least of the *whole* of the remainder, of the signature, this witness is not outborne by those other witnesses, who speak, as professors, on this subject, and regard it in a scientific light. But, independent of this, parts of a signature, so made, might well be more tremulous and others less so, according as the deceased, sitting up in bed, shifted from a more, to a less, convenient posture, or *vice versa*; or even according as, remaining in the same position, he bestowed more or less pains on the different component parts of it.

This witness's next reason is, that some of the letters in "Tho<sup>s</sup>." are *painted*, or touched up. This is the *old* objection, of which, as a general objection, I shall say more presently. Meantime, if the fact were so, it proves nothing—for the deceased was not in that state of extreme bodily debility, as to be incapable of retouching some of the letters, if not sufficiently clear, as struck off in the first instance.

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Mr. Baring's last reason is, that the *signature* bears a strong resemblance, in point of hand-writing, to the *body* of the instrument, particularly the letter "s" in "Thos." Now admitting this similarity, it proves nothing; the deceased's hand-writing certainly has something, as already observed, of similarity to Mr. Croft's. But when this witness puts in the similitude of a single letter, the letter "s," this last reason really becomes unworthy of grave judicial remark.

Of the evidence to hand-writing, thus far, this then is the general account. Three witnesses are produced to prove this signature a forgery, no one of whom was intimately acquainted with the hand-writing of the deceased, or had seen him write for a number of years. Two of the three have doubts, but concur in the *general similarity* of this, to the deceased's *admitted*, signatures: the third disbelieves, but assigns reasons for that disbelief, in no degree valid, in my judgment, to justify and sustain it. On the other hand there are five witnesses of as high respectability, deposing from an intimate, and much more recent, intercourse and acquaintance with the deceased and his subscriptions (and this, too, after doubts had been suggested of its genuineness) to *this* being his actual signature; and so deposing from similarity, not of particular letters, but of general character; ordinarily, the only safe criterion upon which to form an opinion upon such a subject. It would surely be waste of time to attempt to sum up this evidence on both sides, in order to strike a balance.

But the opposers of the will have obtruded on the notice of the Court evidence (if it should be so called)

to this part of the case, of a somewhat different species. I mean, the opinions of persons, who, without any previous knowledge of a party's hand-writing, *think* they can judge, from their skill and experience in such matters, whether a signature, for instance, said to be his, be so or not, by comparing it with other, his admitted, signatures; and who also *undertake*, by certain indications, to determine, from the general appearance of hand-writing, whether it be written in a natural or an imitated character. This species of evidence has been constantly held, both subdivisions of it, the lowest and weakest that can possibly be offered. The first subdivision indeed, or evidence to hand-writing that rests upon mere comparison, is inadmissible, *at common law*: if indeed, the observation does not rather apply to this branch of evidence, in both its subdivisions, under the authority of the case of *Gurney v. Longlands (a)*, the last case in which any question respecting it has occurred at common law, that I am aware of. Inclining strongly to this view of the subject, the Court, so far as regards the present case, might say, at once, that the effect of this evidence, be it what it may, would fail to bring the scale as to proof of hand-writing even to an equal balance; much more, would fail to turn it, and convict this instrument of fabrication and forgery. But the evidence of this species actually adduced in the present cause, suggests some considerations, into which the Court may, not unusefully, enter, as applicable to this subject, generally.

Here are seven witnesses of this class examined in the present case—five of the seven being persons in

(a) 5 Barnewell and Alderson, 130.

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official situations (three in the post-office, and two in the bank): added to these are an engraver, and a law stationer. Now to what, taken in its general result, does their evidence amount?

In sustaining the case which they are produced to, namely, that this signature is a forgery, these gentlemen all agree. At that end in common, they *all* arrive. But, though they agree in their conclusions, they differ so widely in their premises—the reasons, comparatively few, which they assign in common, are so vague and unsatisfactory—in many, not unimportant, particulars, they so flatly contradict each other—and in others, most, if not all of them, in turn, are so flatly contradicted by admitted facts in the cause—that their evidence, taken as a whole, fails to induce any suspicion even upon my mind of this instrument being, what they so confidently pronounce it, a forgery. For instance, as to the vague and inconclusive character of most of their *common* reasons, the circumstances, I observe, which they nearly all assign as their reasons for deeming this signature to be written, in a feigned, and not in a natural, hand, may be amply accounted for by the deceased's state and condition, at the time of this instrument being signed. One common reason is the *old* objection, as I again term it, of "*painting*" (a):

(a) To assist the Court in detecting this, a glass of high powers, said to have been used by these gentlemen in order to its detection, was offered to the Court at the hearing. This offer the Court peremptorily declined—observing, in substance—that glasses of high powers, however fitly applied to the inspection of *natural* subjects, rather tended to distort, and misrepresent, than to place *such* objects in their *true* light—especially when used (their *ordinary* application in the hands of *prejudiced* persons) to confirm some theory, or preconceived opinion.

there can scarcely be a less certain criterion. Many persons have a trick, or knack, or habit, of retouching their letters; it was that, well known to his contemporaries, of a late eminent advocate in this Court (*a*); most of whose notes and opinions might be easily convicted of being forgeries, according to this criterion. It may happen to *any* person, not in the habit of it, to pass over his letters a second time, from a failure of ink in the pen that traced them in the first instance. In short, this circumstance of painting is, itself, extremely trivial. Again, as to contradicting each other, some of these witnesses are confident that certain letters, exhibited by the opposers of the will, are *not* of the hand-writing of the deceased—others are as confident that they *are* of his hand-writing. Lastly, as to the contradiction which *certain* of the witnesses experience from admitted facts in the cause, there are several of them pretty confident, that the body of the will, the subscription to it, the pencil instructions, and the indorsement on the envelope, were all written by one and the same individual, namely, Croft. The weight of evidence so preponderates as to justify me in terming it an admitted fact in the cause, that they are the hand-writing (to say nothing of the signature) of three different persons, viz. of the deceased, Croft, and Allen. Nay, the indorsement is now suggested by Wakefield himself to have been written by Allen; and affidavits, filed on his part, are actually before the Court, in which that fact is distinctly sworn to (*b*). Witnesses so deposing, to say the least, are completely neutralized; and it may be sufficient,

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(*a*) The editor believes Dr. Lawrence.

(*b*) See note (*a*), page 97, *post*.

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so far as respects the present case, to dismiss their evidence with that single remark. But, as with reference to general practice, I earnestly recommend, that no attempts should be made to obtrude such evidence on the Court in any *future* case. It occasions considerable certain expence; that *any* benefit should result from it is most unlikely; but that any considerable benefit should, may be safely pronounced nearly impossible. In aid of a good case it is wholly superfluous, as the Court deemed it, for instance, in the case of *Saph v. Atkinson (a)*, where it is to be recollected, that the Court had made up its mind to pronounce *against* the will, before it adverted to the direct evidence adduced in proof of the signature to it being a forgery, at all. That, in support of a bad cause, it is, at best, merely unavailing, this very case may serve to shew. Meantime these professors ordinarily, as in this instance, speak their opinions with a confidence which renders the admission of their testimony in such cases even highly mischievous; from its probable tendency, to mislead, not indeed the Court, but its suitors, to the almost unavoidable creation of expence, and delay, and inconvenience, to both parties. If it should asked, of what use, then, is the art which these gentlemen profess, if it can never be depended upon? In what cases may it be fairly invoked, and to what objects safely applied? I answer: its legitimate use I take to be this—it may be reasonably resorted to by parties whom a suspicious, or suspected, instrument purports to deprive of a legal benefit, for their own private information, in

(a) See ante, vol. i. pp. 212, *et seq.*

the first instance; it may be safely relied on to the extent of suggesting the propriety, on their parts, of caution, doubt, and inquiry. But whether evidence to hand-writing of this species can ever be of much, if of any, avail, under circumstances not *very* extraordinary, when the authenticity of the instrument comes to be finally determined upon by the competent forum (a matter which must depend upon almost infinite, more stringent, considerations) is what, for reasons sufficiently apparent, I much incline to doubt. Still with all this, this Court, which is subordinate to a higher tribunal, may not feel itself warranted in altogether rejecting such evidence, if tendered to, and pressed upon it, against the uniform course, of, at least, its *modern* practice. But this Court would not regret having the sanction of the superior tribunal, the Court of Delegates, either to reject such evidence altogether, or at least to confine its admission to those (perhaps nearly un-supposable) cases of such high doubt and nicety that a mere feather weight would give a preponderancy to the evidence for, or against, the instrument; when it might be resorted to, after publication, by direction of the Court itself, for its own information; which I incline to think was actually the *old* mode of introducing such evidence into these causes (a).

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## (a) PREROGATIVE COURT OF CANTERBURY.

3d December, 1756.

MACHIN and TYNDALL v. GRINDON and Others.

A codicil bearing date in 1755 was propounded and pleaded to be all written by the deceased. The adverse party pleaded on the

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It only remains to observe that the case set up by the opposers of this will, which I have thus gone through in detail, and which I think in no degree effectual to defeat the claim of this will to probate, had, all along, to contend with one nearly insuperable obstacle, *à priori*: for, it ventured to charge a direct fabrication and forgery, in the absence of that which could alone render them at all *probable*. An instrument is not forged without some inducement; nor can there be a conspiracy without conspirators. Now what, even as suggested, was the inducement, and who were the conspirators, in *this case*, are, up to this instant, to the Court at least, profound secrets. Not only no proof is offered, but it is not even suggested in plea, in concert with whom this asserted fraud and forgery on the part of Croft, were perpetrated. As to the fabrication of this will by Croft, *ex mero motu*, and not

contrary, that it was not his hand-writing, and pleaded, in supply of proof, several receipts dated in 1752, which were alleged to be the deceased's hand-writing, and to differ from the codicil both in the character and manner of spelling.

Dr. Simpson objected to these exhibits, as having been written three years before the codicil, in which time a man's hand-writing might greatly vary, and therefore as no evidence to prove the codicil *not* to be the deceased's hand-writing.

But I was of opinion that they are a species of evidence that might induce a probability for or against the codicil; and that such exhibits have always been received as evidence, and therefore I admitted them.

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It should seem from the above case, (which is copied from Sir George Lee's "manuscript book," by favor of Dr. Phillimore. See 1 Phill. p. 166.) that the present practice is one of some standing. See further on this head, generally, the case of Beaumont v. Perkins, 1 Phill. 78, and the cases of Reilly v. Rivett, and Heath v. Watts, as stated in the notes on that case.



in concert with anybody—the very supposition of it is absurd—for it neither conveys, nor purports to convey, any benefit whatever to Mr. Croft, either directly or indirectly. The parties principally benefited under this will, the brothers and sisters of the deceased, and their families, were thousands of miles off, in this country. The brother James, to be sure, was at Calcutta; from which place Croft had then recently sailed to Macao. Was he the conspirator? Was it in concert with him that this gross fraud was schemed and executed by Croft? Impossible! How were opportunities for the practice of this fraud to be anticipated when Croft left Calcutta? For instance, how could it be foreseen that Croft, on arriving at Macao, would find the deceased in a dying condition, and bent upon revoking a recent will, in order to make a new one, through *his* instrumentality? Croft was a perfect stranger to the deceased, nor indeed on terms, it should seem, of particular intimacy with his brother, James Pattle—not even, I observe, his attorney.

An hypothesis, set up by the counsel for Mr. Wakefield at the hearing, is equally unsubstantial with that which would represent this forgery as a concerted scheme between Croft and Mr. James Pattle. It is, that a will was actually made for the deceased by Croft in the manner which he has deposed—only—that *this*, is not *that*, will: in other words, that the will so made has been subducted; and that this is a supposititious will that has been substituted in its room. Now, here again, as to who were the privies to this fraud, and what were the inducements, the Court is left in the dark—nor is the suggestion (for it is merely such) to which I am adverting, borne out by any one fact in

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the case with which I am acquainted. On the contrary, facts are in evidence that, in conjunction with what appears on the face of the instrument itself, render this hypothesis hardly capable, as it is wholly unworthy, of a serious refutation.

For instance, this envelope was addressed to the executors (it is now admitted on all hands) by Allen, being the person who substituted the name of Shank, for that of Pearson, on the third side of the will. This last is proved by the opposer's own witness, Captain Langford, (confirmed by Ross) who deposes, not only to the address on the envelope, but to the name of "Shank," over the erased name of Pearson, being in Allen's hand-writing. Now, of what plausible explanation is this circumstance capable, on the hypothesis of this being a supposititious instrument, substituted for the genuine will? On the contrary, admit it to be the genuine one, as deposed by Croft, and the circumstance almost explains itself. Croft leaves the will, when executed, with the deceased—he hears and knows no more about it. The deceased, though in full possession of his mental faculties, is ill; and peevish, and fretful—he is worried about money concerns—Pearson has gone with the factory to Canton, and has never once, as he complains, come *down* to see him. Is it any thing unlikely that the deceased, in this mood, should strike out *his* name, and substitute another's, before directing this will to be sealed up? Now, if this resolution was adopted within the last fortnight, or three weeks, of his life, Croft could not be the agent; for he had left Macao, and returned to Calcutta. The deceased, however, had still two persons about him, whom he occasionally employed,

as he himself told one of the witnesses, as "secretaries," Livingstone and Allen. Livingstone, of the two, was least constantly about him, except as a mere medical attendant—nor was it probable that he should be selected, by preference, to strike out a legacy to his friend, and partner, Pearson. Allen was the very person of all others whom the deceased would naturally employ, not only to address his will, when sealed up, but to alter this legacy: accordingly it is in the hand-writing of Allen, that, not merely the address on the envelope, but the name of Shank, substituted for that of Pearson, is proved to be. How strongly this corroborates the whole transaction, as well as how inconsistent it is with the hypothesis now set up, is too obvious for comment.

If the case rested here, it would only remain, that the Court should pronounce this instrument amply proved. But an application made to the Court just previous to the hearing, and still persisted in, is first to be disposed of; being an application, "to rescind the conclusion of the cause, in order," it is said, "to let in fresh evidence." But that application, in substance, comes to this: the parties who oppose this will, finding, or fearing, that they have failed to sustain their original case, crave leave to abandon it, and to set up a new case altogether.

Now, this sort of application is one that, obviously, the Court can *seldom* be expected to accede to—admitting it, as it does, to be not *impossible* for parties to suggest a new case, even in this stage of a cause, which the Court safely might, and, for the sake of justice, would admit to proof. In the present instance it might be *sufficient* to say, that the Court is too

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satisfied of the claim of this will to probate, as the genuine, and *last* will of the testator, for its conviction to be shaken by the case which is now attempted to be made on the part of Mr. Wakefield, the person in whose *sole* behalf this application is made—and that no evidence of which that case is capable, would induce it to come to a different conclusion, or to pronounce against the force and effect of the will, which has been propounded, and, in my judgment, has been proved in this cause. In this view of the subject, it might be *sufficient* for the Court to proceed, at once, to its sentence—the more especially as Mr. Wakefield's counsel, with due delicacy towards the Court, as well as with great judgment towards their client, have kept this part of his case in the back ground, as much as possible. But as mysteries are always best avoided, and as those decisions, correct in themselves, are always most satisfactory, of which the reasons are *also* given, I shall state, very briefly, what the suggestions are upon which this application is founded: in order to obviate any possible misconception of the grounds upon which I hold myself bound to reject it.

The suggestion, then, is, that the deceased made a will subsequent to this, namely, on the 28th of October, of a different tenor and effect—in which case, to be sure, there is an end of the will propounded in this cause, whether it be genuine or a forgery—and *that*, on the same 28th of October, he caused a letter to be written to Mr. Templar, one of his executors, which he *signed*—adding at the foot of that letter a memorandum, which he also *signed*, containing the substance of this will—which letter, however, was never forwarded to Mr. Templar. The bequests of this sug-

gested will are as follows: 2000*l.* per annum to the widow, during widowhood; to be reduced to 1000*l.* per annum in case of her marrying again—and a specific legacy of 50,000*l.*, together with the residue, to the daughter; after payment of certain other specific legacies to friends and relations, amounting probably, in the whole, to 16 or 18,000*l.* Hence it appears, that under this will, Mr. Wakefield, who sets it up, would be entitled at least to 100,000*l.*

Now, the will itself is suggested to have been fraudulently destroyed; so as not to be producible in any event: but that is not all. The letter to Mr. Templar, with this memorandum at the foot of it, is also suggested to have been recently *lost* (a) by Mr. Wake-

(a) Of the paper so suggested to have been *lost* by Mr. Wakefield, the following is a copy:—

“ . . . . . gives me hopes, though I am in a very weak state, and sometimes fear the worst.—You will, I hope, receive a duplicate of my will soon after this—but, if not, pray take great care of this. God bless you, my dear friend, and believe me ever,

“ Your sincere and attached friend,

“ THO<sup>s</sup>. CHA<sup>s</sup>. PATTLE.”

“ Substance of my will.

“ Thomas Pattle, my father, 500*l.* a-year for life. At his death the principal to become part of the residue of my property. James Pattle, William Pattle, Sarah Roche, and Eliza Mitford, 1000*l.* each, &c. &c.”

(At the foot.)

“ Read and approved by me, and signed to make it valid, in case of any accident to my will at Macao, the 28th of October, 1815.

“ THO<sup>s</sup>. CHA<sup>s</sup>. PATTLE.”

“ J. W. Croft.”

In support of the motion to rescind the conclusion of the cause, a variety of affidavits were tendered from persons to whom the

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field, out of his pocket, just on the eve of its being deposited in the registry of this Court, (though not till *after* it had been shewn to divers persons, and copies of it had been taken)—so that this “letter” is forthcoming no more than the original will. The body of this letter, I should say, is suggested to be in the hand-writing of Allen, who died, some years back, at Manilla.

Now, here, in the first place, it is not immaterial to consider, how far the utmost proof of which this suggested case is capable, would really advance Mr. Wakefield’s object—only premising, that of any *particulars* relative either to the making, or the destruction, of the *will itself*, nothing is suggested. Who wrote it—who attested it—who destroyed it—who substituted the forged will—what were their motives, or what their inducements?—nothing as to all this is even suggested. The Court has a mere suggestion, *upon hearsay*, that such a will was made, and was destroyed.

Of what proof, then, is this *letter* capable, even if recovered and produced before the Court? It can merely, as the case is laid, consist of evidence to the hand-writing of Allen, and to the deceased’s subscription; the rule of this Court being, that evidence to hand-writing *only*, is incapable of substantiating *any* disputed instrument as a will. But the Court is promised no *such* evidence; for the paper is lost—or if paper had been shewn, as to the body of this paper being in the hand-writing of Allen. There were also affidavits made by Mr. Joseph Hume, and one or two others, to their belief, (speaking from a comparison of hand-writing,) of the signatures “Tho<sup>s</sup>. Cha<sup>s</sup>. Pattle” and “J. W. Croft,” being genuine. In several of the former affidavits, the indorsement on the envelope of the will was also sworn to be in the hand-writing of Allen.

such evidence, it must be all *ex parte*—there can be no counter evidence. I am also to recollect, that in the event of a *copy* of this letter being propounded, the parties who propound it are subject, in no case, to an indictment for forgery—they are not acting, consequently, under that responsibility. It is true that the name of Croft, as a sort of attesting witness, is suggested to have appeared upon this paper. But were Croft himself produced to its genuineness, and in support of the case now set up, he would be discredited, *in toto*, by the evidence that he has already given in this cause. The obvious presumption would be, that he had been corrupted and bought over.

Now, under these circumstances, even if some plausible and unsuspecting account of the *finding* of this letter could be suggested—giving a probable history of where it was first discovered—in whose hands and keeping it had been for the last eight years, and so on—still the letter itself, *à fortiori* a copy of it, is capable of no proof, which would justify the Court in pronouncing for it as containing, in substance, the deceased's will. But the suggested history of the "*finding*" of this letter is neither plausible nor unsuspecting: On the contrary, it is most extraordinary in itself; and pregnant with suspicion on the very face of it. It is this—

Eight years after the death of the testator, and four from the commencement of the present suit, some anonymous person writes to Major Robson, who had married the deceased's widow, relative to certain testamentary papers of the deceased, asserted to be under his control, or in his possession. Not receiving, in answer, a satisfactory communication from

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Major Robson; he addresses Mr. Wakefield, through the two-penny post, in the month of June last, (1823) on the same subject. He continues to write Mr. Wakefield anonymous letters, but will give no address; and will receive no answer, but through certain mysterious advertisements in a newspaper. He offers him, in these, 10,000*l.* not to bring this suit to an issue—an offer which he repeats at Paris, though why, at either time, is not *suggested*. The correspondence is thus carried on for some time—but this mysterious person will consent to no interview (or, as Mr. Wakefield expresses it in his affidavit, “will venture upon no disclosure of facts”) in England—he will only consent to an interview at Paris. To Paris Mr. Wakefield goes, accompanied by his brother and a solicitor; where, at length, the parties meet; and where this paper, the “letter,” is finally delivered to Mr. Wakefield by his late anonymous correspondent—after a solemn promise and written engagement entered into on his part, “neither to disclose his name, nor to give any information which may lead to its disclosure, under any circumstances;” previous to, and without which, he had refused to consent to any interview, or to make any disclosure connected with the subject, even at Paris. And this is the suggested history of the “*finding*,” if it may be so termed, of this instrument. I should add, indeed, that this mysterious person is suggested to have disclosed, at this interview, that a letter, similar to the one then delivered to Mr. Wakefield, was in the possession of one Smith, formerly a seaman on board the *Alpheus*, but then (and still) absent in the West Indies, as quartermaster, on board of his majesty’s ship the *Ganges*;



but how it came into Smith's possession, or why he has kept it back for the last eight years, &c. &c. is neither explained, nor attempted to be.

In my judgment a plea, setting up such a case as this, would have been inadmissible, at the very commencement of the cause. But to open the cause, in this stage of it, after the publication of the evidence, upon such grounds, is really quite out of the question. The suggestions contained in these affidavits, taken in themselves, (for the Court has not even *seen* the affidavits filed by Major Robson in reply) howsoever sustained, are incapable of leading to any other conclusion than that at which the Court has arrived upon the evidence: and the Court must, therefore, at once, pronounce in favor of the will propounded in this cause.

The only remaining consideration is that of costs. The parties calling in the probate, were neither *barred* by any lapse of time, nor even by their having *acted*, and received their legacies, *under* the will: they had *still* a *right* to call for proof of it *per testes*, if they suspected it not to be genuine. Here, however, their *right* stops—and they are clearly subject to the costs occasioned by their having pleaded this instrument to be a fabrication and a forgery, having produced slight, if any, grounds to justify such a proceeding. Upon this principle, and in further consideration that, although in possession of *their own* legacies, they have now, for upwards of eight years, intercepted the stream of the deceased's testamentary bounty to his *other* legatees, the Court is of opinion, that it is bound, in justice, to give costs from the time when the parties who oppose this will gave an allegation.

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Extra day,  
23d Feb.

(On the Admission of an Allegation.)

**JUDGMENT.**

In a rejoinder to, or upon, a responsive allegation, the only facts strictly pleadable are those either contradictory to, or explanatory of, facts pleaded in the allegation to, or upon, which it rejoins; and those *noviter preventa* to the proponent's knowledge—though the court may, in its discretion, permit facts to be pleaded which came under none of those descriptions, under certain circumstances.

Sir JOHN NICHOLL,

The deceased in this cause, Ely Stot, died in the month of November, 1821. He left a will which was propounded in a common *conditit*, in Trinity Term 1822, by Mr. Thomas and Mr. Valentine Clark, (two nephews of the deceased, as being the children of a deceased sister) his two residuary legatees; and a counter allegation on the part of Mrs. Dew, his only child, was given in, and was admitted on the same day (a). A second allegation, on the part of the residuary legatees, was filed in June, 1823; and the present question respects the admissibility of a plea, tendered on the part of the next of kin, responsive to this *second* allegation of the residuary legatees.

The case originally set up in opposition to the will, on the part of Mrs. Dew, was, principally, one of partial insanity. Her allegation charged, that the deceased, from her earliest infancy, had taken an aversion to her, his only child, founded purely on mental illusion—and that the will in question, sought to be impeached, was the immediate and direct offspring of that insane and irrational antipathy, and not of a

(a) See ante, vol. i. pp. 279, 285.

sound and *disposing* mind and memory. At the same time it distinctly charged upon the deceased something of *general* insanity, or insanity unconnected with such aversion towards his daughter, especially betraying itself upon *religious* matters and concerns.

The counter plea to this, on the part of the Mr. Clarks, was long, and special, consisting of thirty-one articles, accompanied with several annexed exhibits. Its objects, briefly stated, were two; 1st, To establish the deceased's general capacity—and, 2dly, To shew that his treatment of his daughter in particular, if harsh or severe, was still not insane or irrational: for, that it was justified or excused by misconduct on her part, into some circumstances of which it entered with, at least, no too great apparent feeling or delicacy, *as at this time*; though the *ultimate* propriety of this course of proceeding, or the contrary, must obviously *much* depend on the proofs to be made in the cause.

The allegation now tendered to the Court, in part, consists of facts contradictory, or explanatory, of those set up in that last mentioned, to which it responds. Such facts are, I think, *entitled* to be pleaded: so also are those facts, material to the question at issue, if any, *noviter preventa*, to the proponent's knowledge: but so are *not* any other facts whatsoever, at least as of strict right. At the same time, if any facts are here pleaded, which, though coming strictly under none of these descriptions, yet still are both important in themselves, and bear directly upon the *will*, the subject-matter of the suit, the Court will be disposed, in the exercise of its discretion, to admit them in the present instance, for the two following

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reasons. In the first place, it will be extremely unwilling to exclude *any* facts really bearing upon the case of an only child, so, nearly, disinherited, and so attacked, in point of character, merely from their not having been pleaded at precisely the requisite time, according to strict form. 2dly, The Court will be justified to itself in conceding this indulgence by what has been stated to it as to the particular course of the prior proceedings (a); a statement of which it sees no reason to entertain any doubt or suspicion, confirmed, as it is, by what appears on the records of the Court, and which certainly distinguishes the present case from ordinary cases, in this particular. But, independent of these *special* considerations, as the whole matter had been put in issue by the prior pleas, the Court would, undoubtedly, have excluded *all* facts not either explanatory, or contradictory, or newly come to the proponent's knowledge—facts of which three descriptions, I have already said, she is *entitled, de jure,*

(a) It was said, that the plaintiff's first allegation had been hastily constructed, and was brought in on the same day with the *condidit*, namely, on the by-day in Trinity Term 1822, in order to found an application (acceded to by the Court) for leave to take the depositions of certain material witnesses, far advanced in life, upon it, *de bene esse*, in the course of the then ensuing long vacation—that a supplement was originally intended to have been given in, on the part of the plaintiff, in the shape of additional articles—and that such intention had only been abandoned on its becoming known to her professional advisers that the defendants counter plea would be of a nature absolutely to require a rejoinder, in which rejoinder such supplemental matter might conveniently be embodied. And it was said to be under these special circumstances, that supplemental matter to the original plea was introduced into the cause, in this late stage of it.

to plead : and which, consequently, the Court is also, *de jure*, bound to admit. Upon these principles, it seems to the Court, that parts of this allegation are admissible—and that other parts it is bound to reject.

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The case set up in the first part of the plea to which this allegation responds, is, that the deceased (though “of a violent and irritable temper,” and of “great pride and conceit”—though “very precise in all his domestic and other arrangements,” and one who entertained “high notions of parental authority”—though “of rigid Calvinistical principles,” and deeply impressed with ideas “of the total and absolute depravity of human nature,” of the necessity “of sensible conversion,” and of the expediency of “confessing to others the most secret thoughts of the heart,” yet still) “at all times before, and down to the end of, the year 1820, conducted and managed the whole of his pecuniary and domestic affairs, as well as all professional and other matters of business, in a rational manner;” was “of sound and perfect mind, memory, and understanding;” and was fully competent to the performance of any act “requiring thought, judgment, and reflection.”

Now, the 1st article of this allegation appears to me strictly contradictory of that part of the defendants’ case to which I have just adverted. It pleads, in substance, that the deceased did not, to the time specified, “conduct himself and his concerns, pecuniary or domestic, in a sane and rational manner”—for “that he frequently gave ridiculous and contradictory orders to his servants and trades-people”—that he would frequently, when cattle were being driven by

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his house, "rush into the street, abuse the drivers, and insist, with violent oaths, that no such cattle should pass his door"—that he would frequently ring up his servants in the middle of the night, and insist "that it was morning, refusing to be persuaded to the contrary,"—"that he would frequently be low and desponding, and cry, for hours together, without any apparent cause or motive,"—and, finally, that in these and many other respects, he so conducted himself, long prior to the year 1820, as to induce his neighbours, friends, and others, to believe him of unsound mind, and incapable of managing himself and his affairs.

The above is, in substance, the 1st article of the plaintiff's allegation before the Court; and it seems to me entitled to be admitted, as strictly contradictory of the first case made in the plea given in by the defendants. The principal objection taken to it—namely, that it departs from the case originally set up by the plaintiff, which is said to have been one of *partial* insanity—appears to me to be sufficiently obviated by this consideration. Such partial insanity was, originally, and I presume still is, what the plaintiff means *principally* to rely upon. At the same time the deceased was distinctly represented, even in her first plea, as labouring under insanity upon points, not connected with those delusions which he was charged to have felt with respect to the character and conduct of his daughter, the plaintiff, in particular. In this view of them, the plaintiff's former allegation well consists with this part of her present plea—sufficiently well, at all events, to entitle it to go to proof; especially under the circumstances, to which the Court

has already adverted, connected with the bringing in of her former plea.

But the succeeding articles from the 3d to the 9th, both inclusive, (for of the 2d the Court will presently dispose) appear to me inadmissible in this stage of the cause for several reasons. They purport, each, to allege some specific fact, in proof of the general charge conveyed in the 1st article (*a*). But of these the whole, with the exception of the 9th, are very considerably remote in point of date, and are to some extent equivocal as proofs of actual insanity; whilst the most material may be examined to, either under the 1st article of the present, or under articles of the same proponent's former, allegation. Upon these con-

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(*a*) For instance, the 3d article pleaded, that the deceased gave orders (probably before 1808, though no precise date was assigned to this transaction in the plea) that the baker who supplied him with bread should ring the house-bell without putting his feet on the steps leading up to the house-door, which was impossible; and that he flew into violent rages, and threatened to dismiss him on this impossible condition not being complied with on his part. The 4th article—that on a servant having given him notice that he meant to quit his place, in the year 1808, the deceased rushed upon him, forced him into a corner of the room, and attempted to cut his nose off with a razor. The 5th, that in 1810, he stuck up a notice to the Bishop of Durham, who attended him, as a patient for medical electricity, requiring him to clean his shoes before he came into the house. The 6th pleaded a certain transaction between the deceased and a Mr. Willatts, whom the deceased took a fancy to on seeing him at St. John's Chapel, Bedford Row, expressive at least of great eccentricity. The 7th, that the deceased frequently spoke, in the most inflated terms, of the cures which he performed with his electrical machine; and solemnly ascribed to himself *supernatural* powers, in effecting the same, &c. &c. &c.

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siderations I think them either inadmissible, or not necessary to be admitted, in this stage of the cause, and consequently shall reject them.

The 2d article is of a different description, and is, I think, proper to be admitted, notwithstanding the remoteness, *in point of date*, of the transaction to which it refers. It pleads that, some time in the year 1800, the deceased insisted on his daughter, who was only eleven years of age, passing the night with one of his female patients, then resident in his house, labouring under insanity; and that he actually compelled her so to pass the night, as a punishment for some crime of which he alleged his said daughter to have been guilty. This I think a material fact. This irrational *mode* of punishing a child only eleven years old, (for such I conceive it), even supposing her to have been guilty of some delinquency, has, I think, a strong tendency to shew that the deceased's general treatment of, and conduct towards, his daughter, was, as set up on her part, irrational; and that it was not justly incurred by any misconduct of which she had been guilty; which is the case laid in the second, and perhaps most material, part of the adverse plea.

The 10th article is also, I think, clearly admissible. It had been pleaded, in the 17th article of the allegation to which it responds, that the said Charlotte Mary Dew (then Stot) frequently made to her said father and other persons *voluntary* promises, as well written as verbal, to strive to correct her "vile disposition," to "bend and subdue her stubborn will," &c. &c. which promises the article concluded by pleading, that the person who gave them had con-



stantly broken, and disregarded. And in part supply of proof of the premises so pleaded, five several exhibits, being original letters from his said daughter to the deceased, were annexed to the allegation; containing such admissions of misconduct, accompanied with such promises of reformation and amendment.

It is now, in effect, pleaded on the part of the daughter in this 10th article of the allegation under review, that she did, occasionally, make to her said father, and also to other persons, admissions and promises to the effect charged and pleaded in the adverse allegation, but that such promises were not *voluntary*: on the contrary, that they were extorted from her by the deceased; and were written under great mental anguish and anxiety, arising from previous harsh treatment, and its threatened repetition, either under his immediate dictation, or under that of persons to whom the deceased had made false representations of her character and conduct. And the article concludes with expressly averring that his said daughter faithfully regarded and performed her promises of endeavouring to conform her conduct to the rules laid down by the deceased, so far as the same were practicable; although all her efforts to please him, and secure his affections, were rendered hopeless and unavailing, by the general unsoundness of the deceased's intellects, and by the gross delusion under which he laboured in particular, as to his said daughter's conduct and character. This 10th article, so in part explanatory, and in part contradictory, of those material averments contained in the 17th article of the adverse allegation, must, I think, clearly be admitted.

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The 11th, the 12th, and the 13th, are also either directly contradictory, or explanatory, of facts, or charges made, in the plea to which it responds, and are consequently admissible, on the same principle as the 10th.

The 14th article pleads, that in the month of February 1821, a commission, in the nature of a writ *de lunatico inquirendo*, issued out of Chancery at the petition of Mary Stot, the wife of the deceased, to inquire of the lunacy of the deceased; who was stated in the petition to *then* be, and to have been *for the last three weeks*, so far deprived of his reason and understanding as to be incapable of governing himself, and managing his affairs—that in the return to that commission, the deceased was certified to have been *found* of unsound mind from the 1st day of January preceding, under which return a commission of lunacy was afterwards applied for and obtained—and *that* the whole of the above proceedings took place, in the absence, and without the knowledge, of the said C. M. Dew, or her husband, who were entirely ignorant of the same till after their actual conclusion. All this appears to the Court very material, and proper to be pleaded, even in this stage of it, under the special circumstances of the cause. It is an important fact in the cause, that the deceased was, at least, in the latter part of his life, *found* to be insane; and the daughter's ignorance of these proceedings is material on this account; it may assist, at all events, in explaining why, when the deceased was so found to be insane, his insanity was found by the jury *only* to have commenced on the 1st of January preceding, and

was not carried back to an earlier date. At all events, the daughter, as not being a party to that proceeding, is in no sort bound by the finding of the jury, as to the particular date of the commencement of the deceased's incapacity.

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The 15th article only pleads certain exhibits to be official copies of some of the legal instruments referred to in the preceding article; which being admitted, this, together with the exhibits themselves, must also of course be admitted.

16, 17. The 16th article is to this effect: it pleads that the husband of the said C. M. Dew, in her right as the daughter, and sole heiress at law of the deceased, became entitled to certain freehold property, of which the deceased died possessed, in the event of his *legal* intestacy—that with a view of putting at issue the legal validity of the said will, considered as a devise of real property, an action of *assumpsit* was brought in his majesty's Court of King's Bench by Mr. Dew, against John Fletcher, a devisee in trust, named in the said will, for the recovery of a certain sum of money received, by the said John Fletcher, on account of rent which had become due on the said property subsequent to the death of the deceased, expressly grounded upon the deceased's incapacity to devise the said property, as a person of unsound mind—that the said action was, *in substance*, defended, after pleading the general issue, by Mr. Thomas and Valentine Clark, the defendants in this cause—and that, on the 20th December, 1822, a verdict was found for the plaintiff in the said action, with costs, which were assessed at the sum of £376l. 1s. 3d.; the original sum as for the recovery of which the said action was

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brought, having been the sum of 3*l.* 18*s.* 9*d.* only. And the 17th article pleads the third annexed exhibit to be a true copy of the final judgment given in the said action.

The admission of these articles has been opposed with much warmth, but not, I think, with equal success. As facts and circumstances not unconnected with the matter at issue, I think that this action and verdict may fairly be pleaded: they are strictly *novi-ter preventa* to the proponent's knowledge; for they have occurred subsequent to the admission of her former plea. The case is one of a nature to require every illustration: nor is the Court disposed to shut its eyes, to any fact or circumstance whatever which is capable of illustrating it, by no too remote a probability. It will be for the Court to guard against the admission of this part of the plaintiff's case operating, *unduly*, to the prejudice of the defendants: their apprehension of which prejudice is, obviously, the real ground of their objecting to its admission.

It has been said that the plaintiff was, naturally, anxious to submit her case, in the first instance, to a jury, that with such a case she had a much better prospect of succeeding with a jury, through the medium of their feelings, than of obtaining the sentence of a Court, constituted as this is, in the exercise of its judgment. The Court has no scruple in avowing that it participates, to some extent, in the feeling, with which a British jury may be supposed to have looked at a case of this description: at the same time it is fully aware of the propriety of suffering its feelings, in no case, to be biassed to the prejudice of its judgment; nor will the Court shrink from the task of con-

sidering this like other cases, impartially, according, to the known and recognized laws of evidence, when, if ever, it presents itself to it for final adjudication: however painful to itself, individually, may be the conclusion, at which, in its judicial capacity, it is forced by this process to arrive.

The Court has also been told, or reminded, of the original backwardness of Courts, like this, of *ecclesiastical* jurisdiction, in permitting the husband who is suing for a divorce by reason of his wife's adultery, to plead the verdict recovered in an action for damages, brought by him against the alleged adulterer at common law. The fact however of such verdicts being, and having long been, pleadable in such suits, is beyond all question; and the very principal objection to their reception in such cases, is one, *according to the plea*, wholly inapplicable in the present. It was constantly objected that the wife was no party to the action for damages; and *this* was always represented as constituting the hardship of suffering the verdict in such action to be pleaded to her prejudice. But that no similar objection applies in the present instance is quite obvious, *according to the plea*—for the action is *pleaded* (however the fact may be) to have been in substance defended by the identical parties who are now defending the suit in this Court.

18, 19. The 18th article also seems to the Court admissible. It pleads that the defendants in this suit were for years well acquainted with the deceased's unnatural conduct to his daughter, and that Mr. Thomas Clark, one of the defendants, wrote and sent a letter to the deceased, under an assumed or feigned name, in the month of February 1807, reproaching him

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with such conduct, as well towards his said child as towards his own sister, a widow, (mother of the defendants) by suffering her to languish in extreme poverty and wretchedness, without any relief or assistance, although himself in affluent circumstances. And it also pleads that the deceased entertained no regard or affection for his nephews, the defendants; and that he had neither seen nor had any communication with them for nearly twenty-four years before, and down to, the time of his death.

Now this article appears to me directly responsive to the case set up in the plea upon which this allegation rejoins, it being, that the plaintiff experienced from the deceased no other harshness or severity than was the just, or natural, result of her own misconduct. It can never be deemed immaterial to shew, nor is the plaintiff in my judgment precluded from shewing, that one, at least, of the defendants, entertained or expressed very different opinions in 1807; and although many years have elapsed *since* those opinions were expressed, yet it is to be remembered that the plaintiff was, at that time, a woman grown (seventeen or eighteen years old), and that, even then, she had been guilty, according to the defendants' case, of much of that misconduct now imputed, as justifying the aversion with which the deceased is admitted to have regarded her. Neither is it immaterial (nor inadmissible, even in this stage of the cause, I think, under the peculiar circumstances of it), that the deceased was upon no terms of intimacy or communication with the defendants, in whose favor the plaintiff, his only child, is virtually disinherited by this very will, the validity of which is at issue between the parties in the cause. The 19th article, with its accompanying

exhibit, the original letter referred to in the 18th, is a necessary appendant to that article, and must consequently be admitted, as of course.

20, 21. The 20th and 21st, the only two remaining articles of this allegation seem also to the Court proper to be admitted. The defendants had averred in the 30th article of their plea, that the plaintiff and her husband had *acquiesced* in the deceased's will by formally consenting, in the month of January, 1822, that certain funds and effects of the deceased, then in Chancery, should be transferred to the defendants as administrators of the deceased's property with this will annexed. She now pleads, in this 20th article of her allegation, as explanatory of that fact, that such partial acquiescence was, in effect, caused or occasioned by the liberal professions, both verbal and written, of esteem and affection made to her by the defendants shortly after the death of the deceased; and by promises held out that arrangements should be presently entered into for admitting her to a participation with themselves of the benefit derived to them under the deceased's will. And certain exhibits are pleaded, in the 21st article, to be notes or letters, written by the defendant, Thomas Clark, with the knowledge and privity of his co-defendant, to the plaintiff, in the months of November and December, 1821, expressive of such esteem and affection, and allusive to such proposed arrangements. What its final effect in the cause may be I will not undertake to anticipate: but I think that this is matter explanatory of a not immaterial adverse fact pleaded in the defendant's allegation; and consequently that the plaintiff who propounds, is strictly at liberty to go into proof of it.

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Subject to these observations I admit this allegation, with the exception of those articles from the 8d to the 9th inclusive, which I reject for reasons already stated.

Allegation admitted, as reformed. \* \* \*

\* \* \* From which admission of the above allegation and exhibits, as reformed, an appeal was interposed in due course, by Mr. Thomas and Mr. Valentine Clark, to the High Court of Delegates. This appeal was heard in that Court on Friday the 9th of July (1824) : when their Lordships were pleased to affirm the sentence appealed from, and to condemn the appellants in the sum of 100*l.* "*nomine expensarum.*"

The Judges who sat under the commission were—

Mr. Baron HULLOCK,  
Mr. Justice PARK,  
Dr. ARNOLD,  
Dr. COOTE,  
Dr. BURNABY,  
Dr. DAUBENY,  
Dr. GOSTLING, and  
Dr. LEE.

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USTICKE v. BAWDEN.

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By-day.

(*On the Admission of an Allegation.*)

An allegation, setting up the revival of a will upon the cancellation of subsequent testamentary papers, under which only, it had stood revoked—admitted to proof.

STEPHEN USTICKE, late of Penwarne House, in the county of Cornwall, esq. was the party deceased in this cause : he died possessed, in his own right, of



certain real estates, estimated at the value of 400 or 500*l.* per annum; and of some personal property though said to be not very considerable: he had also a life interest in the mansion-house, and an estate, at Penwarne, bequeathed to him by his late uncle Sir Michael Nowell, under the circumstances and subject to the condition (presently to be stated) as pleaded in the second article of the allegation before the Court; the admissibility of which was the immediate point at issue in the cause.

The deceased left at his death the following testamentary papers.

1. A regularly executed will bearing date on the 1st of July, 1807. By this instrument he gave and devised all his real property, of what nature or kind soever, to John Vigurs, in trust for Frances Elizabeth Bawden (party in the cause) for life, and after her death to two other persons for 500 years, in trust, to raise, by sale or mortgage of such estates, the sum of 900*l.* to be paid in legacies of 300*l.* each to three of his nephews. Subject to this trust, the testator devised all his said estates, after the death of Miss Bawden, to his nephew Lewis Charles Peters for life; with remainders, successively, to his heirs male and female; in default of such heirs to another nephew, with similar remainders; and in default of issue, male and female, of such other nephew, to his, the testator's, right heirs for ever. He also bequeathed by his said will a leasehold brewhouse and premises to Miss Bawden *for life* (remainder to his nephew Day Perry Le Grice), together with all his personal estate and effects, *absolutely*; and appointed Miss Bawden his sole executrix.

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The second testamentary paper was,

2. A will, bearing date the 5th of January, 1821, made, and cancelled, under the circumstances pleaded in the 9th and 10th articles of the allegation. By this will of the 5th of January, 1821, the testator bequeathed an annuity of 400*l.* to Miss Bawden for life; and the rest of his estate, both real and personal, after payment of certain legacies, (of which the principal was an annuity of 80*l.* for life to his niece Miss Lenny Peters) to his nephews, Michael Nowell Peters, and Charles Lewis Peters, absolutely.

3. The third testamentary paper was a will, bearing date the 8th day of January, 1821, made, and cancelled, under the circumstances pleaded in the 11th article of the allegation. Its principal object seems to have been, to give Miss Bawden, in addition to her annuity of 400*l.* all such goods, chattels, and effects, as the deceased should die possessed of, to and for her own use and benefit, absolutely. For the rest, it agreed, in substance with the will of the 5th of January, preceding; especially as to the disposal of the residue.

4. The fourth testamentary paper, was a codicil to this will of the 8th of January, 1821, and bearing date on the 20th of the same month, pleaded in the 11th article of the allegation. It reduced Miss Bawden's annuity for life to 200*l.*; but, otherwise, ratified, and confirmed, the said will.

5. The fifth, and last, was an unfinished testamentary paper, without signature or date, but pleaded in the 12th article of the allegation to have been made and written by the deceased, considerably subsequent to January, 1821. In this unfinished paper, Miss Bawden's annuity *was* also fixed at 200*l.* only.

A proctor for Miss Bawden had *propounded* the whole of these testamentary papers: but the case, in substance, on her part laid in the allegation before the Court was, that the will of 1807 had revived in consequence of the cancellation of the several testamentary instruments as pleaded, by and under, which only, it had stood revoked.

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The allegation, pleaded,

1. *That* Stephen Usticke, the party deceased, died on the 26th of January, 1823, leaving a brother, the Reverend Robert Michael Nowell Usticke, (party in the cause), and, together with three sisters, and several nephews and nieces, entitled in distribution to his personal estate and effects, if pronounced to have died intestate.

2. *That* the deceased, above five-and-twenty years before his death, became acquainted with, and attached to, Frances Elizabeth Bawden (party in the cause) a lady of respectable family and connexions, and that he engaged to marry, and subsequently would have married the said F. E. Bawden, but for the disapproval of his uncle, Sir Michael Nowell, from whom he had great expectations; *that* Sir Michael Nowell died in 1802, having first by his will, bearing date the 25th of April, 1797, left the deceased his mansion-house, for life, and a freehold estate of 1500*l.* per annum; but upon express condition of his not marrying Miss Bawden; in which case he, the testator, revoked such devises, and limited over the devised premises to other uses.

3. The third article merely pleaded the paper-writing No. 1, exhibited in supply of proof, to be a true copy of that part of Sir Michael Nowell's will,

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relative to the devises pleaded in the preceding article.

4. *That* the attachment of the deceased and Miss Bawden continued to subsist after the death of Sir M. Nowell; *that* no marriage took place between them by reason of the penalty annexed to that occurrence in Sir M. Nowell's will; but *that*, in 1802, Miss Bawden was induced to take up her residence with the deceased, and that she had lived and cohabited with him *as his wife*, from that time till his death—*that* she was visited by many of his family, both male and female, and that the deceased constantly felt, and expressed the greatest regard and affection for her, throughout, and during the whole period of, their said cohabitation.

5. *That* in April 1803, the deceased made and executed a deed of gift of various personal property (*a*) to Miss Bawden (described therein as his intended wife), her executors, administrators, and assigns, for ever; on condition of her permitting him the use and enjoyment of the same during *his* life-time, and with a proviso, that the deed should be void in case of his

(*a*) Viz. "all his household furniture, plate, linen, &c. horses, cattle, corn, hay, &c.; live and dead stock; and finally, all his goods and chattels of whatsoever nature, lying or being at the house which he then occupied at Mawnan, in the county of Cornwall and on the lands and tenements attached thereto; and also on the tenement of Boskenning, in the said parish of Mawnan." Very few of the goods and chattels mentioned in this instrument were in the testator's possession at the time of his death, or if in his possession, capable of being distinguished from those at Penwarne, in which he had only a life interest—upon which and other (*legal*) grounds, it was admitted to be very doubtful, whether this deed of gift, though in existence, could have any operation.

survivorship; and *that* he delivered this deed to Miss Bawden, in whose custody it remained till the 8th of January, 1821, when it was given up by her to Mr. Edwards, of Truro, the deceased's friend, and solicitor.

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6. The 6th article only pleaded the exhibit No. 2, to be the original deed of gift, pleaded in the next preceding article.

7. *That* the deceased, during the last twenty years of his life, expressed, at various times, and to divers persons, his intention of amply providing for Mrs. Ustick (as Miss Bawden was generally called); on which occasions he commonly added, when speaking to persons in whom he confided, *that* "she had sacrificed every thing for his sake."

8. The 8th article pleaded the *factum* of a will, bearing date the 1st of July, 1807, made and executed by the deceased, in duplicate (*a*), in the presence of witnesses; and now propounded, on behalf of Miss Bawden, the sole executrix named in it.

9. *That*, in or about the beginning of January 1821, the deceased, with his own hand, wrote and made a new will; and executed the same, also in the presence of witnesses, on or about the 5th day of January in that year, when the same bears date.

10. *That* about that time the deceased, having expressed, as with reference to his testamentary arrange-

(a) The duplicate of this will was said still to be in the possession of Messrs. Shephard and Adlington, solicitors, in London, who had prepared it; in the same state, of course, as when executed by the deceased: it was not suggested that this *duplicate* had ever been in the deceased's possession.

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ments, his regret at Mr. Edwards, his attorney, not being *at hand*, the attendance of that gentleman was bespoken by Miss Bawden; *that* the deceased, on seeing him, shewed him the will of the 5th of January, 1821, and gave him instructions for divers alterations to be made in it; and *that* Mr. Edwards immediately converted the same, by alterations and interlineations, into a draft for a new will, which the deceased, on the 8th of January in the same year, duly executed in the presence of witnesses, having been prepared by Mr. Edwards, pursuant to such instructions, in manner aforesaid; *that*, upon the execution thereof, the deceased delivered the said will to Mr. Vigurs, his apothecary, who, after *several months*, returned it to the deceased, at his request; *that* the deceased, *some time afterwards*, but *when* the proponent is unable to propound, *cancelled* the same by tearing off his signature from the several sheets of the said will; and also wrote, with his own hand, as well several memoranda on the backs of the sheets, as various alterations in the body of the said will, either prior, or subsequent, to the said cancellation; *that* Mr. Edwards took possession of the will of the 5th of January, 1821, *upon* the execution of that of the 8th of January, and retained the same, till after the deceased's death.

11. *That* soon after executing his said will, the deceased, with his own hand, wrote a codicil to his said will; and executed the same, in the presence of two subscribed witnesses, on the 20th of January, 1821.

12. *That* a considerable time subsequent to January, 1821 (but when particularly the proponent is unable to propound) the deceased began a new will to secure a

provision for Miss Bawden [a paper exhibited in the cause, in the deceased's hand-writing, but] without date, or signature.

13. That some short time before his death, the deceased frequently expressed his desire to see Mr. Edwards, his solicitor, who lived at a great distance from him, in order finally to arrange his affairs, but did not send for him, or appoint any day for his attendance; *that* three days before his death, Mr. Vigurs, his apothecary, said to the deceased, whom he perceived to be in great danger, speaking on the subject of his will, "I hope you have made no alterations to the injury of Mrs. Usticke," meaning Miss Bawden, so called; when the deceased replied, "No; die when I will she will find that she is left better than Sir Michael left Lady Nowell;" and *that* the property left by Sir Michael, to Lady, Nowell, so referred to by the deceased, nearly equalled in amount the property left by the deceased himself to Miss Bawden, by the will of July, 1807.

14. That some time after the death of Sir Michael Nowell, the Rev. Robert Usticke (party in the cause) sought, by means of an ejectment, to obtain possession of the mansion-house of Penwarne, in the county of Cornwall, being part of the estate devised to the deceased by Sir Michael Nowell as aforesaid, on the alleged ground, that the deceased was actually married to Miss Bawden—a marriage forbidden, under pain of forfeiture, by the will of Sir M. Nowell; *that* the deceased deeply resented this attempt to deprive him of his property, and from this, and other, causes, became at variance with, and was never reconciled to, his said brother, to the day of his death.

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15. The fifteenth article pleaded the finding of the above several testamentary papers [which were all exhibited in the cause] subsequent to the death of the deceased, viz. the will of 1807, *in a drawer under lock at Penwarne, to which the deceased had always free access up to the time of his death*; the paper bearing date the 5th of January, 1821, in the possession of Mr. Edwards; the cancelled will of the 8th of January, 1821, and the unfinished testamentary paper, in a desk in the deceased's counting-house, or office (a); and the codicil of the 20th of January, 1821, in the possession of Mr. Beauchamp, a relation by marriage, to whom the deceased had delivered or sent it, sealed up, with a request that he would take care of it.

16. The 16th and last, was the usual concluding article, averring the truth of the premises.

#### JUDGMENT.

Sir JOHN NICHOLL.

I think that this allegation is clearly entitled to go to proof. The point for the Court's ultimate decision will be, whether the cancellation of a latter will by the testator, did, or did not, amount to the revival of a former, *only* revoked by that will, so, itself, subsequently cancelled. Upon that point, it would be premature to express a decided opinion in the present stage of the cause. The case set up in this allegation is in affirmance of that revival; for the facts averred in it are supposed, and are pleaded in order,

(a) This counting-house or office was described in the argument as a private room in the garden, detached from the house, of which room, itself, the deceased always kept the key, as well as that of the desk in it, in which the testamentary papers in question were found.



to shew, that a former will of this deceased did revive, upon the cancellation of a latter, expressly revocatory of that former will in its uncanceled state. I think it quite impossible to say that these facts, *as pleaded*, are incapable of justifying the Court in arriving at that conclusion, so that the allegation is clearly, I repeat, not inadmissible. Much of course indeed must depend, looking to its final effect, upon the nature and degree of proof by which the facts pleaded in it are substantiated. Much also must depend upon the strength of the adverse case; should an adverse case, that is, be set up for the next of kin, either by means of interrogatories, or by that of a substantive, independent, plea.

Where an allegation propounds an *imperfect* testamentary paper, it being a clear principle that the legal presumption is *adverse* to that paper, the allegation must contain facts of a sufficiently stringent nature to encounter, and repel, an *adverse* legal presumption, in order to insure its own admissibility. But an allegation pleading facts more equivocal is admissible, *either way*, in a case like the present: for in *neither* alternative, as I take it, is there any *adverse* legal presumption to encounter or repel. This Court is founded in holding, under the sanction of the superior Court, that the legal presumption is neither adverse to, nor in favor of, the revival of a former uncanceled, upon the cancellation of a latter, revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, *solely* according to facts and circumstances. This, I conceive, is the true principle to be extracted

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The legal presumption is *adverse* to an unfinished or imperfect will: but to the revival of a former uncanceled, upon the cancellation of a latter revocatory will, the legal presumption is neither favorable to nor adverse. The law has furnished that principle, requires; and leaves the question one of intention, merely, and open to a decision, either way, according to extrinsic facts and circumstances.

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from the judgment of the Court of Delegates in the case of *Moore v. Moore and Metcalf* (a)—a case determined, after an able argument, upon the fullest consideration.

It is quite unnecessary to inquire what principle would be applicable to a case of this description totally nude of circumstances; as I think it next to impossible that such a case should ever occur. If ever such a case actually does occur, it will be for the Court to deal with it, according to the best of its judgment, *pro re nata*. But I can scarcely figure to myself a case either without concomitants; or with these so nicely balanced that neither side prevails. There must always, I think, be circumstances in both scales; and preponderating circumstances either in the one or the other, so as not to leave the case itself, where the law seems to leave it, purely in *equilibrio*.

The present case, at all events, is not one of that description: on the contrary, taking the facts to be true, and to be encountered by no adverse case (the former of which I am bound to assume, and the latter I am not called upon to anticipate) its circumstances are numerous, and, I must say, strongly in favor of the revival. There are strong circumstances tending to shew the deceased's intention to leave a will, of some sort, in favor of Miss Bawden, and not to die wholly intestate. But the question clearly lies between the will of 1807, and an intestacy, under which Miss Bawden is, of course, left without any provision. The cancellation of the will of the 8th of January clearly did not revoke that of the 5th—for the will

(a) See 1 Phillimore, pp. 375 and 466.

of the 5th of January itself, was cancelled by its very conversion into a *draft* for this will of the 8th of January. The codicil of the 20th of January, expressly refers to this will of the 8th of January; and was cancelled, *ipso facto*, by the cancellation of that will; with which it must be taken to stand, or to have fallen. The mere incipient testamentary paper is of no effect or avail in law—it is without date or signature—*non constat*, precisely, even according to the plea, when it was written—and although it might, as *pleaded*, have been written, “considerably subsequent to January, 1821,” yet still, I observe, that it is written on paper which has the water-mark of 1808, being, however, in either event, equally unavailing in law. The question clearly then, I repeat, lies between this will of 1807 and an intestacy—which the circumstances pleaded are strong to shew that the deceased at no time ever contemplated. His intention to provide for Miss Bawden, after his death, is evidenced by a series of *facts*, independent of the general probabilities of the case: in particular, by the deed of gift of 1803, and by the will of 1807, to which he adhered, stedfastly, for any thing that appears to the contrary, for fourteen consecutive years, namely, till the year 1821. And though, subsequent to 1821, his mind does seem to have fluctuated as to the provision to be made for this lady *in point of amount* (whether from diminished regard, or, as suggested, from the decreased and decreasing value of his property (*a*), or from some or other cause), yet still this

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(a) It had been suggested, in the course of the argument, that a decrease in the value of the deceased's property had actually taken place about that time, to a considerable extent, as well from

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whole series of scripts is strong evidence of his intention, at all times, to leave Miss Bawden provided for, at his death, in some sort—which must be defeated by an intestacy, under which she can take *no* benefit.

Again, the declarations pleaded to have been made by the deceased to his apothecary, Mr. Vigurs, three days before his death, are strongly confirmatory of the case set up in the allegation—as it is difficult, or rather impossible, to say to what they refer, if not to the will of 1807. The Court is fully aware of the danger of relying too implicitly upon declarations: it is fully aware that they are open, in all cases, to *suspicions*, of insincerity on the one part, and of misapprehension, at least, on the other: under this impression, it will examine these declarations, when they are before it in a final shape, and in conjunction with *all* the circumstances of the case, with the utmost caution. But if entitled to *any* credit, they must go *some way* to justify an inference, that the deceased, at the time of making them, held this will of 1807 to be operative—and, consequently, that he must have considered it to revive upon the cancellation of the subsequent will of 1821.

The same conclusion is strongly fortified by another fact *pleaded*. The will of 1821 *had been* out of the deceased's possession: it had been delivered to his friend Mr. Vigurs, I presume, for safe custody. But the deceased reclaims it—and, having so done, he

the general depreciation of landed property, at that time, as from particular circumstances connected with the failure of a brewery, in which the deceased had been, in some measure, interested or concerned.

cancels it, carefully and deliberately, in a highly formal manner, namely, by tearing off his signature, at that time affixed to every one of the five several sheets of which this will consisted. - But the will of 1807 is *pleaded*, (at least *sub modo*) *to have been always in his own possession, and in a place to which he had access.* It is not for the Court, at present, to conjecture, to what the proof of this fact, so (I admit to some extent *equivocally*) *pleaded*, may ultimately amount. But should the fact be proved to have been, at all, as *pleaded*—*à fortiori*, should it be proved that this will of 1807 was, or must be taken to have been, not unfrequently under the deceased's own notice, and immediate inspection, his not having cancelled *this* in as careful a manner as he had cancelled the will of 1824—and, still more, his not having cancelled it at all—will certainly raise a strong presumption that he meant it to revive, and become operative, on the cancellation of that instrument by which only it had been revoked.

Upon these considerations—and without going more minutely, at present, into all the circumstances of the case, the Court is satisfied of the propriety of admitting this allegation.

Allegation admitted.

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## EASTER TERM.

## ARCHES COURT OF CANTERBURY,

The Office of the Judge promoted by  
DAWE and NOCKOLDS v. WILLIAMS.

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(By Letters of Request from the Archdeaconry  
of Huntingdon.)

4th Session.

Articles  
against a pa-  
rishioner for  
"brawling,"  
&c. by reading  
a "notice of  
vestry," in  
church, dur-  
ing divine ser-  
vice, without  
due authority,  
admitted to  
proof.

An objection  
to the jurisdic-  
tion of the  
Court to en-  
tertain a suit  
for "brawling"  
by "letters of  
request," over-  
ruled.

**THIS** was a cause or business of the office of the Judge, promoted by William Dawe and Martin Nockolds, respectively, parishioners, inhabitants, and churchwardens of the parish of Tring, in the county of Hertford, Archdeaconry of Huntingdon, Diocese of Lincoln, and Province of Canterbury, against Henry Williams, also a parishioner of the said parish, for his soul's health, &c. and, **ESPECIALLY**, for having "created a disturbance in the parish church of Tring aforesaid, during the time of divine service therein," and for having "quarrelled, chode, and brawled, by words, in the said church, during such time." It was a proceeding in this Court, the Court of Arches, in the first instance, by virtue of "letters of request," under the hand and seal of the "Commissary of the Lord Bishop of Lincoln, in, and throughout, the Archdeaconry of Huntingdon."

The *criminal* charge, as contained in the third of six articles, exhibited on the part of the promovents, was as follows—that "on the morning of Sunday, the 24th of August, 1823, and during the time of divine service in

the parish church of the parish of Tring aforesaid, he the said Henry Williams, (the defendant) not being a churchwarden, overseer, or officer of the said parish, did enter into the porch of the said church, and affix, and leave affixed, on the door of the said church, a written notice, in the words and figures, or to the effect following, to wit, 'Take notice, that a vestry will be ' held in this church on Friday next, the 29th day ' of August, at three o'clock, to choose new church- ' wardens in the place of the present ones.'—Signed "George Kingsley, Charles Belcher, overseers ; ' Adam Morton—William Firth—Thomas Wood- ' man'—that he, the said Henry Williams, then entered the said church, accompanied by Adam Morton, an inhabitant of the said parish, and having taken his seat with the said Adam Morton in his pew, did, during the time of divine service therein, and immediately after the Rev. Charles Lacy, the minister then officiating in the said church, had concluded reading the Nicene creed, stand up in the said pew, and, not regarding the sacredness of the place in which he then was, and without any lawful authority whatever, did, irreverently, read aloud a notice in the words, or to the precise effect, of the said written notice, so affixed, as aforesaid, on the door of the said church—and did, moreover, then, and there, irreverently, and indecently, chide and brawl, in the presence and hearing of the congregation then assembled in the said church—and did, thereby, and by so reading aloud the said notice, as aforesaid, interrupt the performance of divine service, create a great disturbance in the said church, and give great offence to the congregation assembled therein." The

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articles concluded by praying that the defendant might be "duly corrected for such offence according to the exigency of the law"—might be "admonished, to refrain from the like behaviour in future"—and might "be condemned in the costs of the suit."

*In opposition to the admission of the "articles,"* it was submitted, that the act charged upon the defendant had nothing of that *malus animus*, on the face of it, which, it was contended, was essential to the offence of "brawling." What, it was said, is the intrinsic character of the act? When any thing is to be proposed to the parishioners relative to the general management of the parish, the churchwardens are the proper persons to call a meeting of the parish. If the object of that meeting be personal against the churchwardens (as in this instance), it may be, (as the fact was in this instance) that they refuse to call a vestry. What then are the parish to do? Are they not to meet in vestry at all? That can hardly be. But if parishioners *are* to meet, legally, in vestry, a prior "*notice*," in church, similar to the one in question, is absolutely requisite under Mr. Sturges Bourne's act (*a*); which says not a word as to whom vestries shall be called by, or at all prescribes the course to be pursued when the churchwardens; the persons authorized to call them in the first instance, refuse or decline—an omission, possibly, fit to be supplied in the event of any revision of that act. Under these circumstances, it should seem, *primâ facie*, that such notice of vestry must be given in church, without the authority of the churchwardens; and that the parish, in deputing one of their body to

(a) 58 Geo. III. c. 69. s. 1.



that office, took the only step capable of being taken. The notice in question, even as *pleaded*, was signed by the overseers, and other (respectable) parishioners: so that *the* parishioner deputed to the office of reading it in church was, surely, *sufficiently* authorized, to protect him from being dealt with, for having merely executed that office, as a "*brawler*." Other modes, indeed, may be suggested in which the parish, possibly, might have proceeded. It may be said, for instance, that they might have moved the Court of King's Bench for a *mandamus* to the churchwardens to call a vestry. But, not to mention the circuitry and expensiveness of *this* (the only mode which *readily* suggests itself) such suggestions, it was said, are foreign to the argument—that confining itself, as it does, merely to shewing, that the act charged evinces nothing of that *malus animus*, on the face of it, essential to the offence of brawling; and which unless the Court infers, *from the intrinsic character of the act itself*, it is bound, it was argued, to reject the articles.

Should it be said that "this was a calling of a vestry for an *illegal* purpose," and that hence the Court will infer "*malice*," the answer is. 1st, *non constat*, that this was a calling of a vestry for an *illegal* purpose—but even granting it to have been, still, 2dly, it was not a calling of a vestry for any purpose *so illegal*, on the face of it, that the Court will infer any *malus animus* in the defendant on that account. The power of parishioners to remove their churchwardens, in case of their wasting the goods of the parish (or, it may be presumed, in case of their *other* misbehaviour) is pretty broadly laid down in many

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books of authority. "Churchwardens," says Mr. Justice Blackstone, "may not waste the church goods, but *may be removed by the parish*, and called to account" (a). And it is said to have been *ruled* by the Court of King's Bench, two centuries ago, that parishioners may *displace* their churchwardens, though chosen for a time certain, before the expiration of that time (b). And indeed it should seem, as the law now stands, pretty essential that parishioners should have some such power. "In ordinary repairs," says Bishop Gibson (c), "the churchwardens need not take the sense of the parishioners; and, though indiscreet or over expensive, are entitled to be reimbursed by the parish for what they have expended, so it hath been truly expended, and without profit to themselves; because the parish have constituted them their trustees. Nor have the parishioners, he adds, any remedy but by complaint to the ordinary, in order to their removal." And Priedeaux, in his "Office of Churchwardens" (d) is even still more pointed as to parishes being, in these respects, in the discretion, (it might almost be said at the mercy) of their churchwardens. Gibson, it will be seen, has coupled this power of parishioners to remove their churchwardens with the necessity, or at least the propriety, of a complaint to the ordinary, in the first instance, in order to such their removal. But this, *probably*, might be the very course meant to be pursued in the present instance: it was not necessary in the published "*notice of vestry*" objected to, to enter into any *particulars* of the course meant to be pursued by the parish. "*In order to choose new churchwardens,*"

(a) 1 Bla. Com. 394.

(b) 13 Co. 70.

(c) Cod. 1. 306.

(d) Sections 32 & 33.

might well stand for "*in order to take the requisite, legal, steps for the choosing of new churchwardens*"—leaving those steps to be ascertained by the vestry when actually met.

Under these circumstances, it was submitted, that the mere reading of a notice of vestry, at the time and in the manner charged, was no brawling on the face of it—the churchwardens, the proper persons to call vestries on parish matters, refusing to convene a vestry (as they naturally would) for the purpose specified—and Mr. Sturges Bourne's act providing that no vestry shall be holden without a previous notice in church of the *holding* of such vestry, and of the purpose for which it is intended to be held.

Should the alleged offence be argued to consist in the violation of the rubric, the answer is—that the proceeding in this instance is not *as* for any (real or supposed) violation of the rubric, but for the offence of brawling. The citation is in that form—so are the articles—which are silent as to any violation of the rubric, and only object to the defendant the offence of brawling. Indeed, as to a violation of the rubric, *any* proclamation in church during the time of divine service, unless "*by the minister himself,*" and "*of something, either prescribed in the book of common prayer, or enjoined by the king, or the ordinary of the place,*" is a violation of the rubric—so that the rubric, in the particular question, is violated, without offence, in too many instances to render it probable, that the Court would deem its violation, in the present instance, a fit subject for a criminal prosecution; detached from that other offence the offence of brawling, which the articles charge it to have involved.

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Lastly, it was submitted, that some objections lay to the Court's entertaining a suit for brawling by "*letters of request*," on the following considerations—

By the "bill of citations" (a) none are to be cited out of their dioceses, except in certain excepted cases, the fifth being, "in case that any bishop "or any inferior judge having under him jurisdiction in his own right and title, or by commission, "make request or instance to the archbishop, bishop, "or other superior ordinary, to take, treat, examine, "or determine the matter before him or his substitutes—and that to be done in cases only where the "law, civil or canon, doth affirm execution of such request or instance of jurisdiction to be lawful and "tolerable." Now it is to be collected from this correction [and that to be done in cases only, &c.] that execution of such request, or instance, of jurisdiction, is lawful and tolerable *but* in certain cases: it were a vain correction (as laid down by the Court of King's Bench in the case of *Jones v. Jones*, reported by *Ld. Ch. J. Hobart*)(b), if it were lawful and tolerable in *all*. "No doubt," said the Court of K.B., in the case in *Hobart*, "the statute in question was not made without "advice and hearing of the canonists, and therefore "cannot be supposed to be so ignorantly penned; and "the case, concerning so much the ease of the subject, "deserves much consideration." Now certainly neither the law, *civil or canon*, can affirm the execution of such instance or request of jurisdiction to be "lawful or tolerable" in the case in question. For

(a) Stat. 23 Hen. VIII. c. 9.

(b) *Hob.* 186.

it is a proceeding, in substance, under a statute (a), and consequently, it cannot be supposed to be one of those cases ever in the contemplation of the law, *civil or canon*—it is a proceeding too, under a statute, subsequent, in date, to the “bill of citations”—but that is not all—it is a proceeding under a statute which expressly limits the proceeding to be “*before the ordinary of that place where the offence shall have been committed.*” Consequently this was denied to be one of those cases in which it was “lawful or tolerable” that the suit should be sent up, by letters of request, from the inferior, to the superior, ordinary. Nor is the position, it was said, so taken up upon *principle*, destitute of *authority*, for there is a “*suggestion*” in Winch [Entries 570] for a prohibition to a proceeding before the archbishop in a cause for brawling, transmitted by letters of request, (the identical case in point) on this very ground. The suggestion is express—“*quod cognitio offensæ (si qua offensæ) per statutum prædictum (b) ad ordinarium LOCI, et non ad alium quemcunque judicem spiritua- lem, pertinet ac spectat: ac prædicta offensæ, in arti- culis, sive interrogatoriis prædictis, superius con- tentis (c) (si qua spiritualis offensæ fuisset) ab ordinario LOCI ad aliquem alium judicem spiritua- lem per aliquas literas requisitionum puniendæ fore, mitti NON debeat.*” It was admitted, however, at the same time, that suits for brawling, by letters of request, had been entertained by the Court of Arches in

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(a) 5 and 6 Edw. VI. c. 4.

(b) Ibid.

(c) The “articles” being set out, at length, in the “suggestion.”

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some recent instances (a)—but then the objection does not seem to have been taken in either, or any, of those cases. Upon these considerations it was prayed that the Court would put an end to the suit by rejecting the articles.

*The substance of the argument in support of the articles will be found expressed in the judgment.*

## JUDGMENT.

Sir JOHN NICHOLL.

This is a proceeding as well under the general ecclesiastical law, as under the statute of Edward the Sixth, against the defendant Henry Williams, a parishioner of Tring, for “creating a disturbance in the parish church of Tring, during the time of divine service,” and for “quarrelling, chiding, and brawling, by words, in the said church, during such time.”

The admission of the “articles” in this case, the third of which expresses the particulars of the charge, is opposed: but they appear to the Court sufficiently to contain the ecclesiastical offence charged. A private parishioner has no right during the time of divine service, and of his own authority, to publish such a notice as is here stated, or any other notice, in the church. The rubric expressly states, that “nothing shall be proclaimed or published in the church during the time of divine service, but by the minister, nor by him any thing but what is prescribed by the rules of this book, or enjoined by the king or the ordinary of the place.” And the rubric, as a part of the book of common prayer, is confirmed by

(a) As, in *Newberry v. Goodwin*, 1 Phill. 262, and probably in some other cases.

act of parliament, and constitutes a part of the statute law of the land.

Vestries, for church matters, regularly are to be called "by the church-wardens with the consent of the minister." The late act of parliament (a) neither altered the general authority under which, nor the persons by whom, vestries are to be called: it only added some further formalities in the mode of calling; such as, directing the notice to be put up on the church-door, and that it shall be given a certain number of days before the vestry is to meet.

Suits have been entertained in this Court for offences of the description contained in the present articles; as in the case of "Thompson v. Tapp," and other cases.

Here, then, being an offence sufficiently laid in the articles; and the articles sufficiently conforming to the citation, they must be admitted by the Court.

The proceeding is also under the statute of brawling. That statute was intended to repress all interruption and disturbance, even by words only, of the congregation met for public worship. It has been so construed. Here it is not necessary to express any opinion whether simply reading a notice, wholly unconnected with any other circumstances of irregularity, would amount to such an offence as would form a fit subject for prosecution; since it is obvious, that a private parishioner's proclaiming in the church a notice calling a vestry, in the middle of the year, for the purpose of choosing new church-wardens, must be connected, *primâ facie* at least, with some contest and

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(a) 58 Geo. III. c. 69.

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dispute existing in the parish ; and consequently, must have tended to disturb the congregation, and to call off their attention from the solemn purpose for which they were assembled. The service was not over ; for it is not ended till the grace or blessing is pronounced, dismissing the congregation.

The article pleads “ that he did moreover irreverently there chide and brawl.” If it be intended to prove any other words and expressions (*a*), they should be set forth in the article, so as to give the defendant an opportunity of cross-examining to, and contradicting them.

It has been suggested, upon the authority of some ancient dicta, that under the true construction of the statute of citations, a suit for brawling cannot be brought in the Court of Arches by letters of request : but it is not denied, that suits so brought have constantly been entertained in this Court. Besides, the defendant did not appear under protest ; but after having appeared absolutely to the citation, he takes the objection to the jurisdiction at the admission of the articles. Upon the whole, the Court feels itself bound to allow the suit to proceed, unless it should be stopt by a prohibition : should such a measure be held to lie against the jurisdiction of this Court, under the circumstances of the present case, the Court will readily, as it will be its duty, put an end to the proceeding.

(*a*) This was disclaimed by the counsel for the promovent ; and the word “ *moreover*” was, upon this, struck out of the articles.



IN THE PECULIARS COURT OF CANTERBURY.

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The Office of the Judge, promoted by  
PALMER v. ROFFEY.

4th Session.

**THIS** was a cause or business of the office of the Judge, promoted by Samuel Palmer, a church-warden of the parish of St. Mary, Newington, in the county of Surry, and Deanery of Croydon (*a*), against Richard Roffey, also a church-warden of that parish, for "quarrelling, chiding, and brawling, *by words*, in the church of the said parish;" and, also, for "smiting and laying violent hands upon certain persons in the said church, and creating a riot and disturbance in the same."

Articles against the defendant (a church-warden) for brawling, &c. in church, pronounced to be proved; and the defendant suspended, and condemned in full costs; the case being held to afford no ground for mitigated costs.

The articles, twelve in number, (after pleading as well the general ecclesiastical law with respect to the offence or offences charged, as the statute 5 and 6 Edw. VI. c. 4.; 1st, against quarrelling, chiding, and brawling by words; and 2dly, against smiting or laying violent hands, in any church or church-yard; further,) *in substance*, pleaded; *that*, at a meeting of the parishioners of the said parish, in vestry, on Easter Tuesday, 1823, to choose parish officers for the year ensuing, Roffey, the defendant, the rector's warden, in the first instance "quarrelled, chode, and brawled" with Joseph Hurcomb, a parishioner and inhabitant

In all cases of brawling, &c. in church, where two persons are implicated, which is most to blame is, nearly, immaterial: each is bound to abstain; and each, failing to abstain, incurs a like penalty.

(*a*) Newington is within the jurisdiction of the Court of "Peculiars," as one of the several parishes within the deanery of Croydon, in Surry: which, together with the several parishes composing the deanery of Shoreham, in Kent, and thirteen parishes within the City of London, are subject to the immediate jurisdiction of the Dean of the Arches, as Judge of the Peculiars,

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of the said parish, then and there present, in manner as set forth in the articles, and shortly after, created a riot and disturbance in the north aisle of the parish church (whither the said meeting had adjourned, on a *poll* being demanded by the friends of Mr. Jones, one of two candidates for the office of parish-warden, for the ensuing year, *against* whom the rector had declared the choice of the parishioners to have fallen, on a *shew of hands*), in the course of which he, Roffey, both further “chode and quarrelled with,” and also “assaulted and laid violent hands upon, the said Joseph Hurcomb, and others,” in manner also specified in the articles. Lastly, the articles pleaded that Mr. Palmer, the promovent, the *other* candidate, being the person finally elected to serve as parish-warden with Roffey, the rector’s warden for the ensuing year, had been authorized or enjoined by an order of vestry, made on the 18th of April, 1823, to institute the present proceeding against Mr. Roffey, [as also another similar proceeding against Mr. Tijou, his sidesman (a)] for his conduct, before pleaded, in the said parish church, on the 1st of April then preceding, the occasion articulate.

To this the defendant, Mr. Roffey, gave a responsive allegation, consisting also of twelve articles; its general purport and effect being, to palliate the nature, and circumstances, of his altercation with Mr. Hurcomb, whom it expressly charged to have been the “quarreller, chider, and brawler,” in the first instance; as also that, in effect, he, Roffey, was the person assaulted in the north aisle, namely, by

(a) *Vide post*, under cases in the “Peculiars,” in Trinity Term.

Mr. Hurcomb and his friends, and was not the assailant; and that the only force used on his part (or that of his sidesman Mr. Tijou) was for the necessary protection of his person, alleged to be in peril, from, and by reason of, the violence of, that assault. The allegation also pleaded, that of three witnesses whom it specified, examined upon the articles, the first, Mr. Hurcomb, was himself a party proceeded against in this Court, both for "quarrelling, chiding, and brawling," and also for "smiting and laying violent hands" upon a certain person, or certain persons, on the occasion articulate; and that the two others, a Mr. Richardson and a Mr. Williams, were also themselves, respectively, parties so proceeded against for "quarrelling, chiding, and brawling" (though not for "smiting or laying violent hands") on the said occasion (a).

Fifteen witnesses were examined upon these articles and nine upon the responsive allegation; most, or the whole of whom, were interrogated at considerable length, so that their depositions constituted, together, a great mass of evidence. This evidence had been argued upon by counsel on both sides on a preceding Court-day, and the cause now stood for sentence.

**JUDGMENT.**

**Sir JOHN NICHOLL.**

This is a suit for brawling brought by Samuel Palmer, one of the church-wardens of St. Mary, New-

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(a) These suits were instituted, severally, against the parties named, in Trinity Term, 1823, at the promotion of Mr. England, one of Mr. Roffey's sidesmen. Articles in all three are filed; and witnesses examined. Responsive allegations (brought in, in Easter Term [May] 1824), are also filed in all three; but no witness has, to this time [October, 1824] been produced upon any one of these.

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ington, against Richard Roffey, the other church-warden ; the very description of the parties shewing that in this parish there unfortunately exist differences among the inhabitants. The existence of such differences must be greatly lamented ; and the Court would be happy to remove them, and to restore harmony among these neighbours and fellow-parishioners : but if that cannot be effected, the Court will at least endeavour to avoid aggravating their animosities, and will therefore abstain from entering into a more minute detail of the subjects of dispute, than the impartial administration of justice may render absolutely necessary.

The offence charged in these articles is punishable, as well by the general ecclesiastical law, as by the statute of Edw. the VIth. *specially* referred to in the articles, and it is an offence subject to the jurisdiction of the Ecclesiastical Court (as expressed in the case of *Wenmouth v. Collins(a)*) *ratione loci*. The object as well of that general law, as of the statute, is evidently, to protect the sanctity of those places and their appurtenances set apart for the worship of the Supreme Being, and for the repose of the dead, in which nothing but religious awe and christian good-will between men should prevail ; and to prevent them from being converted, with impunity, into scenes, of human passion and malice, of disturbance and violence.

The sacredness of the place being thus the object of this protecting law, it is no part of the inquiry, where more than one person is implicated in the transaction, which of the two persons so implicated is *most* to blame, or which of them *began* the quarrel. There

(a) Lord Raymond, 850.

can hardly be a quarrel without two parties ; and each who engages in it violates the law, whether he be the most, or the least blameable : each is bound to abstain from quarrelling, chiding, or brawling in that sacred place.

This, then, being the view and object of the law, the sole question at issue in this suit is, whether the defendant be, or be not, proved to have committed the offence charged ; for if it be proved, the Court is bound to punish the offence, and to administer the law, in order to repress the evil.

The history of the transaction out of which the matter arose is, shortly, as follows. On Easter Tuesday, 1823, the parishioners of Newington met in vestry as usual, to choose parish officers. The rector nominated, as his church-warden, the defendant, Roffey, who had served in that capacity the preceding year. Two persons were put in nomination to serve on the part of the parishioners ; Mr. Palmer (who had also served the former year) was proposed by one set of parishioners ; and a Mr. Jones, by another set. On a show of hands, the rector, who was in the chair, declared the choice to have fallen on Mr. Palmer. The friends of Mr. Jones demanded a poll. A poll was accordingly granted ; and the meeting was removed into the church for the purpose of taking the poll. I will here, in passing, venture to express some doubt whether, of necessity, and as a matter of absolute right, a poll, if demanded, must be granted, and must be taken in the church, and must be kept open till *midnight* ; all of which seems to have been assumed upon the occasion : but, at all events, if such a proceeding *must* be had in the church, it must be con-

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ducted decently, and in order, for the occasion will not justify the violation of that decorum and respect which belongs to the place. Yet the transaction has been treated, in some part of the discussion, as if it had happened in the street, or on Kennington Common, Whereas, its taking place in the church constitutes the very *gist* of the suit.

At this vestry at Newington the mode of proceeding by poll being demanded, and allowed, much discussion took place, both before its commencement, and during its progress. Mr. Hurcomb, one of the parishioners, addressed the chair upon some point. Mr. Roffey, the rector's church-warden, standing at the rector's right hand, interrupted Mr. Hurcomb—an altercation took place between them; in the course of which one called the other a "coward," the other retorted by "common informer"—a quarrel arose; and those reproachful terms passed, repeatedly, between them.

If the view of the Court in respect of the law be correct, both these parties violated it: the offence of one is no justification of the other; both ought to have abstained, and both are offenders. Mr. Roffey, himself a church-warden, was, by his very office, more especially bound, not only to observe order and decorum himself, but to enforce the due observance of it in others.

Upon Mr. Hurcomb's case the Court is not, at present, deciding—he is not a *party* in this suit, but is examined as a *witness* in it. Yet if there be a suit depending against him on account of the part he took in this transaction, he will act prudently in considering the shortest mode of putting an end to it, instead of persevering in a hopeless defence.

But whichever of the two was *most* to blame—whichever was the aggressor—there can be no doubt, upon the fact, that Mr. Roffey has committed the offence, which is rendered penal by the statute, as well as under the general law. If it were material, it is stated by some of Mr. Roffey's own witnesses, that he commenced the quarrel.

This part of the transaction alone might be sufficient to compel the Court to pronounce the sentence prayed. The matter however did not end here; nor was it the most offensive part of what took place: for, at a later hour, in the evening, there was a disturbance in the north aisle of the church, of a still more violent character. About nine o'clock Mr. Roffey quitted his station by the polling-table, and passed over into the north aisle, down which he was proceeding with his hat on—an act itself very indecorous, especially considering Mr. Roffey's official character. Offence was naturally taken at this; and several persons cried out, "hats off, in this place—Shame! shame!" Though thus reminded, Mr. Roffey does not appear to have taken off his hat. Mr. Hurcomb was at this time standing in the north aisle, and talking to some persons in an adjoining pew. Roffey passed him; but before he got to the bottom of the church, apprehending, as it should seem, that Hurcomb had said something to him, he returned, and addressing Hurcomb, said, "What is that you say, Joe?" at the same time snapping his fingers in his face. In doing this, Mr. Roffey put his hand up in such a manner as to induce several of the by-standers to suppose that he had struck Mr. Hurcomb; but Mr. Hurcomb himself admits, in his evidence, that Roffey did not, actually, touch his face.

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Mr. Hurcomb stepped back, and lifted up his arm to guard himself, and as if to ward off an expected blow: in so doing he *pushed* Mr. Roffey; but Mr. Roffey's witnesses admit, that this was not done with an intention of *striking* him. A general disturbance immediately ensues: nearly all the persons in the church flock to the place: the constable is called for: and Roffey, being supposed to have struck Hurcomb, is taken into custody by the constable: he struggles: and, partly by his own exertions, partly by the interposition of his friends, and partly by the acquiescence of the constable, at length gets released from custody: Now this undoubtedly constituted a disgraceful tumult in the church, in which the officer appointed to preserve order was himself a party. Possibly Mr. Roffey might have acted under some misapprehension of what Mr. Hurcomb had said as he passed; but whether he apprehended rightly, or wrongly, he acted *improperly* in returning at all, for the purpose of renewing the quarrel *in that place*. It seems unnecessary therefore to examine very minutely which set of witnesses may have represented the circumstances, in detail, with most accuracy. Nor is it necessary to state, minutely, the subsequent circumstances: for even after this disturbance had subsided, the parties do not let the matter drop: the rector is afterwards obliged to quit his place at the polling table, in order to go, and *insist* upon Mr. Roffey's forbearing from all further altercation and disturbance.

This is a general outline of the case sufficient to compel the Court to decide that the offence of brawling, charged in the articles, has been proved against the defendant.



The act of parliament directs, as a punishment, that the offender, if a layman, shall be suspended *ab ingressu ecclesie*, at the discretion of the ordinary. In these days this mode of punishment may not, in all cases, be very appropriate: but, in obedience to the statute, I shall suspend the party *ab ingressu ecclesie*, for the space of one month.

In respect to costs, which in suits of this nature constitute a material part of the consideration, they must, under the circumstances of the present proceeding, follow almost as matter of course. Under possible circumstances, costs may be mitigated; but the present case does not afford grounds for such a mitigation. Mr. Roffey, from his office, was specially called upon to abstain and forbear. The proceeding, on the part of the promoter, cannot be considered as malicious or vindictive. Mr. Palmer was not engaged in the brawling, nor even present upon the occasion. In bringing the suit against Mr. Roffey, he is doing no more than the duty of his office requires of him; and the manner was directed, and approved, by a considerable number of parishioners, who had met in vestry. Perhaps, if Mr. Palmer, and the other parishioners, had directed proceedings to be instituted against those persons generally, who should appear to have been the principal offenders, to whichever party in the parish they might happen to belong, they would have shewn more impartiality, more real regard to public order, and less of party feeling, than by a particular selection. But, without, in this respect, examining, too minutely, the perfect correctness of their judgment, so far as regards the present suit I do not feel that any sufficient ground is afforded, to excuse

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the defendant, who is pronounced to have committed the offence charged, from being likewise condemned in the costs of the suit.

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IN THE PREROGATIVE COURT OF CANTERBURY,

2d Session.

SUTER v. CHRISTIE and Others.

(On Motion.)

The Court, on cause shewn, will permit a married woman, party in a cause, to appoint a proctor, &c. in the absence of her husband; on giving reasonable security to the other party as to his costs.

**T**HIS was a cause or business of proving in solemn form of law, the last will and testament of John Rayner, deceased, bearing date the 31st day of May, 1811, promoted by Mary Suter, wife of Thomas Suter, (formerly Rayner, widow,) the relict of the said deceased, and sole executrix named in the said will, against James Christie, the administrator (with a former will annexed, dated the 23d day of September, 1809,) of the effects of the said deceased; and, also, against the three children of the said deceased, the universal legatees named in the said former will.

The usual decree, with intimation, under seal of the Court, had been duly executed, and returned—and the Court was now *moved*, on behalf of the said Mary Suter, that it would permit the said Mary Suter to appoint a proctor in the absence of her husband, the said Thomas Suter, in order to her proceeding in the said cause or business.

This application was founded upon an affidavit of the said Mary Suter, in which it was stated, and sworn, “*that* her husband, the said Thomas Suter,

had left this country for the Cape of Good Hope, eleven years before; since which time she, the said Mary Suter, had received no pecuniary assistance whatever from him—*that* the said Thomas Suter was believed to have taken up his permanent residence at the Cape of Good Hope, without there being any probability of his return to this country—and *that* he had refused to execute the necessary documents, which had been sent over to him in the year 1819, for enabling his said wife to proceed in the above cause."

Under these circumstances the Court was pleased to "give leave to the said Mary Suter, to appoint a proctor in the absence of the said Thomas Suter, her husband; on giving such security as the other parties in the cause might deem satisfactory, as to their costs." (a)

(a) *Accordingly*, a proctor, on the 4th Session, brought in a bond, under the hands and seals of two persons, in the penal sum of 200*l.*; conditioned for the payment of costs to the extent of 100*l.*, in case the said Mary Suter, or Thomas Suter, her husband, should thereafter be condemned in the costs of the suit.—Then appeared, personally, the said Mary Suter, and appointed her proctor; who, subsequently, propounded the last will of the deceased, bearing date the 31st of May, 1811, in a common *condidit*, upon which witnesses were examined; and, on the 4th Session of Trinity Term, the Court revoked the administration (with the will annexed, bearing date the 23d of September, 1809,) then before granted to Mr. Christie; pronounced for the validity of the latter will; and decreed probate of the same to the executrix.

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## WILKINSON (formerly LAWES) v. GORDON.

4th Session.

## JUDGMENT.

*Quere* whether if A. be convicted of bigamy, as by reason of his marriage with C., living B. his first wife, it is *still* not competent to A., on C.'s death, to propound his interest as the lawful husband of C. in a suit in the Ecclesiastical Court, touching the administration of her effects: and to succeed in such suit on proof shewn; notwithstanding his said conviction for bigamy pleaded and proved.

Sir JOHN NICHOLL.

The deceased in this cause, Frances Elizabeth Gordon; otherwise Lawes, died in the month of March, 1820. Soon after her death, administration of her effects was committed and granted to Thomas Gordon (party in the cause), as the lawful husband of the deceased. The present suit is in consequence of a decree taken out, in the month of May, 1820, by Susanna Matilda Wilkinson (formerly Lawes), the other party, calling on Mr. Gordon to shew cause, why such letters of administration should not be revoked; and why letters of administration of all and singular the goods and chattels of the deceased, as dead intestate, without parent, and a *spinster*, should not be committed and granted to her, Wilkinson, as the sister, and only next of kin, of the deceased.

It is necessary that the Court should state, in substance, the proceedings and pleadings in the cause, with their several dates.

Gordon's interest, as the husband, being formally denied, was propounded in an allegation brought in in Michaelmas Term, 1820. It pleaded merely his marriage, as "Thomas Gordon, widower," with the deceased, in the parish church of St. Marylebone, on the 13th of September, 1818; and their subsequent cohabitation, as husband and wife, until the death of the deceased in March, 1820. These facts were ad-

mitted in the "*answers*," and no witness has been examined upon this allegation.

An allegation was brought in on the part of the sister, in the same Michaelmas Term. It pleaded the marriage of Thomas Gordon, then a bachelor, to Harriet Cole, spinster, in the parish church of Woolwich, in the county of Kent, on the 11th of May, 1809; and their subsequent cohabitation at Woolwich, and "various other places." It then pleaded, in opposition to Gordon's allegation, that he, Gordon, was not a widower at the time of his marriage, *de facto*, with the party deceased in the cause; for, *that* Harriet Gordon, formerly Cole, was then living, and was seen by "divers persons," subsequent to the said pretended marriage; particularly, in the month of March, 1819, at Sheerness; and, in the month of July, 1820, at Chatham. [This, I must observe, is the only mode in which the history of the first wife is traced out by the sister, *in her plea*: she only pleads, *that* she cohabited with Gordon at Woolwich and *other places*, not saying where; *that* she afterwards separated from him, not saying when; *that* she was seen, subsequent to his second marriage, by *divers persons*, not saying by whom—nor saying, when and where, more particularly, than, *that* she was so seen, "at Sheerness in March, 1819, and at Chatham in July, 1820." It must be obvious that it was quite impossible for Gordon to negative these allegations; *unless*, by tracing out the history of his first wife, and by proving her death prior to his second marriage.] The allegation then pleaded *that* Gordon had, on several occasions subsequent to his pretended marriage with Lawes, admitted to "divers persons" that his first wife, to his

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knowledge, was living at the time: and that he had offered considerable bribes to persons aware of that fact, not to give evidence against him in the event of his trial for bigamy. Lastly it pleaded, *that* Gordon was actually indicted for bigamy at the Old Bailey Sessions, in the month of October, 1820, by reason of his marriage with Lawes, living his first wife; and that he was convicted of that offence: it exhibited, in supply of proof, a copy of the record of that conviction; and it concluded by alleging the deceased to have died intestate, and a *spinster*.

Of this allegation, upon which six witnesses have been examined, I will only, at present, say, *that* it puts the *facts* of the first and second marriage, directly, in plea, and at issue. It does not intimate, by any means, that the sister rested for proof of her case, upon pleading, and producing a copy of the record of, Gordon's conviction (*a*) for bigamy; although it made a *part* of her case.

In reply to this allegation of the sister, it was pleaded by Gordon (in Michaelmas Term, 1821), *that* his first wife deserted him soon after the marriage, and became a common prostitute; *that*, some time in 1815, she was admitted into St. Thomas's Hospital as "Mary White;" under which assumed name she had passed for some years preceding, during Gordon's absence from England; and *that* she died, on the 8th of July, 1815, in that hospital, and was buried, as "Mary White," in the burial ground belonging to it. It further pleaded, that the indictment for bigamy, articulate, was preferred *by* Wilkinson; and *that*,

(*a*) Differing in this respect, it is to be observed from the libel in the cause of *Bromley v. Bromley*, vide note (*c*), page 158, *post*.

previous to the trial of that indictment (though subsequent, it is to be observed, to the commencement of *this* cause) she, Wilkinson, had caused hand-bills to be printed and circulated (one of which printed hand-bills it exhibited, in supply of proof) offering a reward of thirty guineas to any person who could prove that Harriet Gordon, formerly Cole, was living on the 14th of September, 1818, when Gordon was married to his late wife, the deceased in the cause. It further pleaded, that Gordon, subsequent to his conviction for bigamy articulate, had received his majesty's free pardon, and it also exhibited a copy of the original warrant of pardon, in supply of proof of that fact. Lastly it pleaded, *that* the property of the deceased, in virtue of a settlement made before her marriage, was secured to Gordon in case of his surviving her; but *that* the deceased, having been taunted by her sister, then Lawes, but now Wilkinson (party in the cause), as *not* the lawful wife of Gordon; and being anxious to secure her property to him at all events, and under any circumstances; had made and executed a will in duplicate, or rather two wills of precisely the same tenor and effect, in the months of June and July, 1820; the one part, or one of the two wills being signed Frances Elizabeth Gordon, and the other, Frances Elizabeth Lawes, spinster, her maiden name; whereby she appointed Gordon her sole executor and universal legatee: and the allegation concluded by pleading and propounding this will, or these wills, in the usual form. Upon this allegation, and certain additional articles, pleading merely the death, character, and hand-writing, of one of the two sub-

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scribed witnesses to the will, thirteen witnesses have been examined.

To this again, it was replied on the part of the sister, Mrs. Wilkinson, *that* the deceased, even prior to her marriage with Gordon in 1818, had been attacked by paralysis, in consequence of which she laboured under considerable mental debility; *that*, subsequent to her marriage, she became more and more deranged (of which fact the allegation purports to furnish many specific instances); *that*, from the latter part of 1818, till her death, she was in the custody of, and extremely ill used by, Gordon; and *that*, at the time of the pretended execution of the will propounded by Gordon, she was of unsound mind, memory, and understanding.

Ten witnesses have been examined on this allegation, which was brought in in Easter Term, 1822: and to this again it has been finally replied, on Gordon's part, to the effect, that the deceased was a person, at all times, of unimpaired capacity; and that she was uniformly treated by Gordon with conjugal affection.

Such is the substance of the proceedings, and pleadings; from which it appears, that the case before the Court has a double aspect. So far as respects the question, whether Gordon is entitled to the property of the deceased, as dead intestate in law, it is an *interest* cause; and, Gordon, in the event of the deceased's intestacy, must prove himself to have been the *lawful* husband of the deceased, in order to sustain his claim. In the other event, that fact is immaterial—for Gordon, under the will is equally en-



titled to her *whole* property, whether he has succeeded in proving himself to have been the *lawful* husband of the deceased, or whether he has failed.

I must here observe, however, that, the first of these questions being determined in favor of Gordon, he has clearly no need to resort to the will: for, as a *feme covert*, the deceased could only die intestate in law. And this, I think, sufficiently accounts for the *late* period at which the will is said to have been produced in the cause; and which has been much observed upon in the argument. It was not incumbent on Gordon to produce this will until after his conviction for bigamy had been pleaded, and the sister had alleged the deceased to have died intestate, and a *spinster*—a circumstance which, I think, sufficiently removes any objection to its validity, as to be deduced from its, alleged, *late* production. Besides, the genuineness of this will is not questioned; it is admitted to have been actually executed by the deceased at the time when it bears date: it is only objected to on the ground of the deceased's incapacity at that time. Under these circumstances, I am of opinion, that the time at which this will was produced has no tendency to impeach the fairness of this part of the transaction.

The first, then, if not the principal question is, did the deceased, Gordon, or Lawes, die a wife or a spinster?

A fact of marriage between the deceased and Gordon is admitted. Consequently, the legal presumption, according to a well known maxim, is in favor of its validity, which it rests with the sister, who calls it in question, to impeach. And this she is said to have done, not merely *primâ facie*, but conclusively, by

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producing a copy of the record of Gordon's conviction for *bigamy*: this is said to have impeached the validity of the second marriage, *conclusively*, so that the Court is estopped from further inquiry into this part of the case.

To sustain this position it has been argued, in the first place, that, according to the rule laid down in Searle's case, "felonies, whereof parties have been convicted, are not re-examinable in other Courts." Now that this is true, *sub modo*, not only of felonies, but also (at least, of one species) of misdemeanors, may be admitted on the authority of Searle's case (a); on that of Boyle (b); on the case of Sir George Bromley (c):

(a) Hob. 121. ib. 288.

(b) 3 Mod. 164. Comb. 72.

(c) Delegates, 1793. This, in the first instance, was a suit brought by Dame Esther Bromley, against her husband Sir George Bromley, baronet, for a separation *à mensâ et thoro*, as by reason of unnatural practices committed by the husband, in the Consistory Court of the Lord Archbishop of York. The libel filed in that Court, after pleading the marriage and cohabitation, &c. of the parties in the usual form, merely pleaded, *that* the defendant had actually been convicted of an assault upon one George Stiff, with intent to commit the offence in question, at the assizes for the county of Nottingham, held at Nottingham, in the year 1790, and sentenced to two year's imprisonment in Nottingham Gaol—exhibiting, at the same time, in supply of proof, a certain paper writing, alleged to be, and contain, a true copy of the record of that conviction. Her ladyship appealed, from the rejection of this libel and exhibit by the Court at York, to the High Court of Delegates, which reversed the sentence appealed from, and admitted the libel to proof—and subsequently pronounced for the divorce as prayed by her ladyship—who afterwards procured an act of parliament dissolving the marriage.

It is to be observed, however, that the rejection of this libel by the Court at York, did not proceed upon any supposed impro-

and on the authority, probably, of some other cases. But the suit in which the *verdict of conviction* was deemed *conclusive* in each of those cases, was this: it was a **PERSONAL** suit, founded **IMMEDIATELY**, upon that offence of which the *defendant* (the party proceeded **AGAINST**) had so been *convicted*. Consequently, none of those cases are in point to the verdict being even *admissible* evidence, much more to its being *conclusive* evidence, in a civil cause upon a mere question of *property* between plaintiff and defendant: which is the character of the present suit.

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priety in the structure of the libel; or upon any supposed necessity that the *practices* in question should be specifically pleaded in the libel, in order to their being proved in *that* Court, in addition to its pleading the conviction, and exhibiting a copy of the record. It proceeded upon a misconception (as it now seems) with respect to the sufficiency of a mere *attempt* to commit, &c. to found a sentence to the effect of that prayed by Lady Bromley.

So in the case of *Ellenthorp v. Myers and Moss*\*, cited in argument by the counsel for the sister in support of their position as to the verdict being conclusive evidence, (but with little effect, this last being a *criminal* proceeding) the *articles* merely pleaded the defendant's conviction of an assault, with intent to commit, &c. and exhibited a copy of the record; as the libel pleaded and exhibited in the subsequent case of *Bromley v. Bromley*. This latter proceeding, that of *Ellenthorp v. Myers and Moss*, was also a cause depending, in the first instance, in the Consistory Court of York, and was described as—"The office of the Judge, promoted by Myers and Moss, churchwardens of Weston, in the county and diocese of York, against Ellenthorp the vicar, for correction of his manners, &c. especially in respect of his having been *convicted* of an assault upon, &c. with intent to commit, &c." in order to his, the said Ellenthorp's, "*deprivation*."

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\* In the High Court of Delegates, 1773.

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The maxim principally, however, relied upon in support of the position contended for on the part of the sister is that laid down by Mr. Justice Buller, in his Law of *Nisi Prius*, viz. "that a conviction in a Court of *criminal* jurisdiction (generally) is conclusive evidence of the fact, if it afterwards come, collaterally, in controversy, in a Court of *civil* jurisdiction." (a) But, if this be the rule, at all, it is subject to many limitations; nor does the case of *Boyle v. Boyle*, to which the Court has just referred, cited by Mr. Justice Buller in support of *his* maxim, by any means bear it out, as a general position. On the contrary, the doubt seems rather to have been—it has often been gravely questioned (b)—whether verdicts which have been given in *criminal* proceedings can be admitted in evidence in *civil* causes, of *this* description, at all: because, the parties are not the same in the civil suit, as in the criminal cause, where the king is always, at least technically, and nominally, the prosecutor; and because, the party in the civil suit, on whose behalf the evidence is supposed to be offered, might have been a witness on the criminal prosecution. If, indeed, the conviction were really upon the evidence of a party interested in the civil action, to admit the record of conviction to be given in evidence *at all*, would be in the teeth of that salutary maxim, which prohibits parties to suits from giving evidence for themselves. *Non constat*, but that the sister was a witness upon the trial of *this* indictment: she

(a) Buller's *Nisi Prius*, 7th edit. 245.

(b) As in *Hillyard v. Grantham*, cited by Lord Hardwicke in *Brownsword v. Edwards*, 2 Ves. 246; and in *Gibson v. M'Carty*, Rep. temp. Hardw. 311; and in *Hathaway v. Barrow*, 1 Campb. 151. See Phillips on Evidence, 256. 260.

is not proved *not* to have been. So again it might very reasonably be questioned whether the verdict should be admitted in evidence at all, where; as in this instance, the criminal proceeding had been pretty clearly instituted *only* to make use of that verdict, in case of the conviction of the party proceeded against, in the civil suit.

Generally speaking; however, I apprehend the true rule to be, that a record of conviction is *evidence* of the same fact in a civil cause, only that it is not *conclusive evidence*. This is the rule to be collected from the following case, as cited by Chief Baron Gilbert<sup>(a)</sup>, and which appears to me, in principle, hardly distinguishable from the present. "If a man has two wives, and be thereof convicted, and dies, and the second wife claims dower, the verdict and conviction cannot be given (*i. e.* conclusively given) in evidence, but, in this case, the writ must go to the bishop: for whether the marriage be lawful or not is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law. But the verdict may be made an exhibit in the cause before the bishop, to *induce* him to believe there was a former marriage."

Such, then, I apprehend to be the true rule, generally speaking. And if there ever was a case of this description, in which the record of conviction ought *not* to be deemed *conclusive* evidence to the commission of the fact by the party against whom it is pleaded, it seems to me to be the present, for several reasons.

In the first place, it clearly appears that the case on the trial was sustained by the single testimony of Nelly

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(a) Law of Evidence, 33, 34.]

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Baker, (a witness who came forward, in consequence of an advertisement, offering thirty guineas for evidence to convict the party) as to *identity*, viz. as to whether a woman who had cohabited for several years with a person named Owens, a seaman, at one time, on board his majesty's ship the *Cadmus*, was, as she, Baker, deposed, the identical Harriet Gordon, formerly Cole, Gordon's first wife, on which the conviction proceeded. All that Johnson (another witness) deposed, in corroboration of Baker, was, that the woman who had so cohabited with Owens, was living in 1819, and 1820—he only knew her to be Harriet Gordon, formerly Cole, *from Baker's information*. And how was Gordon to defend himself against Baker's evidence? It could only be by proving his first wife, of whom it is clear that he knew nothing, *as of his own knowledge*, subsequent to the year 1812, to have been dead at the time of his second marriage in 1818. This he seems indeed to have attempted—he seems, at the time of his trial, to have had some clue to the fact (if it be) of her having assumed the names of Mary White, and having died in St. Thomas's Hospital in 1815: for a woman named Cowen, deposed to that effect on the trial; it being also proved on the trial, that Mary White, or a female passing by these names, actually died in St. Thomas's Hospital in July, 1815. But Cowen's evidence (which went to a single interview with Gordon, formerly Cole, then passing, as she deposed, by the names of Mary White, in 1815, just prior to her alleged admission into St. Thomas's Hospital) obtained less credence, with the Jury, than the more circumstantial evidence of Baker: the rather, it should seem, as a woman, named

Millington, produced to the same fact with Cowen, was discredited from her bad character, and, very probably, *was* deposing falsely on the trial. Her very production, indeed, to that fact seems, not only to have neutralized Cowen's evidence; but to have given an unfavorable colour, in the eyes of the Jury, to Gordon's whole case. Still, however, Gordon, in effect, was convicted upon the testimony of a single witness, brought forward in consequence of the advertisement, to which I have alluded, put in circulation by the real prosecutrix, the party in this suit: who, plainly, indicted, and procured the conviction of Gordon, in order to avail herself of the effect, be it what it might, of that conviction, in this Court; where a cause *solely* dependant (or then supposed to be) on the same fact was actually in progress. This conduct on the sister's part the Court will observe upon, presently—whether these circumstances, namely, Baker's coming forward in consequence of this hand-bill, &c. appeared on the trial at the Old Bailey, I am not aware.

In the next place, I am to remember, that the party convict, in this instance, is pleaded, and proved, to have actually received his majesty's free pardon, a circumstance which materially lessens the effect of that conviction, whatever it might otherwise have been, in the cause. For it is notorious that the prerogative of pardon reserved to the chief magistrate is never exercised indiscriminately or capriciously—that the crown never interposes but upon just grounds after all due attention to the merits and circumstances of the case. It has been argued that the "*forfeiture*" enures notwithstanding the pardon. So it does; but the crown

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is obviously disposed to take no *benefit* of the forfeiture.

Nor does a circumstance, on the other hand, which has been strongly insisted upon, tend much to fortify the effect of the verdict, so weakened and derogated from, as I have just said, by the pardon. It is pleaded, and, I think, proved, that Gordon, prior to the trial, did attempt to bribe some of the proposed witnesses, or, as it is termed, to *buy off* evidence. This, however, though a highly improper act, does not, as contended, necessarily infer any consciousness of guilt on his part. The offence charged was one of which, however *intentionally* innocent, he might, in *fact*, have been guilty. The first wife might have been living in 1818, though he had supposed her to be dead. Under these circumstances, that Gordon, a sea-faring man, naturally under great alarm at the charge, should act as imputed to him, is a circumstance, which, blameable as it is, is quite consistent with the death of the first wife prior to the second marriage. As for his "admissions" (pleaded) "to *divers persons*" that he "*knew* of his first wife being alive at the time of his second marriage," not one of these "*divers persons*" has been produced who speaks to them; so that these allegations themselves, at best, are good for nothing.

In proof of one thing the verdict is clearly good, viz. that Baker was believed, and that Cowen was disbelieved, by the Jury. But the case now stands upon other evidence; so that the Court's arriving at a different conclusion, is no impeachment of the finding of the Jury. Baker, indeed, as I shall presently show,



is still in effect the *single* witness as to this part of the case, on the one side. But Cowen's testimony, which stood alone at the Old Bailey, is *here* fortified and confirmed by the testimony of two other witnesses: and which puts the case that she failed to sustain at the Old Bailey, nearly, I think, above all suspicion as stands upon the evidence in this Court. And the Court, I am of opinion, is at full liberty to look into that evidence, notwithstanding the verdict.

The sister, of course, undertook to prove the case which she has set up in plea; nor will it be denied that she has had ample opportunities of redeeming her pledge, if it was capable of being redeemed. Up to this time, however, the sister's case, in this part of it, as already hinted, still rests, in effect, upon the single testimony of this woman, Baker.

Now was the evidence of Baker difficult of corroboration, had the fact upon which this part of the case turns really been, that a female who cohabited for several years with this Owens, and who, confessedly, was living years subsequent to Gordon's second marriage, was the identical Harriet Gordon, formerly Cole, his first wife? It was the very contrary of this. What is the history of Cole, the first wife, as given by Baker herself? It is this—"that she became acquainted with Gordon and his wife, in, or about, the years 1808 and 1809, at Sheerness; where she, Baker, was then lodging, at the house of a person named Doding, who was cook on board his majesty's ship the *Heroine* (thentofore called the *Venus*), of which ship Gordon was the gunner; *that* Gordon was a married man, and lived on board the said ship, but used to come on shore there very often, *almost daily*, with his wife;

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and *that* deponent, by *frequently seeing* them at that time (the said ship, at that time, lying) at Sheerness, became *well acquainted* with the said Thomas and Harriet Gordon." Gordon, then, formerly Cole, the first wife, according to this evidence, must have been a person well known at Sheerness; as, indeed, also appears from other evidence in the cause. But so, it likewise appears, from the evidence of this same Baker, from that of Johnson, from the evidence of Davis, and that of other witnesses, must have been the female who long cohabited with Owens. And yet the identity of this female with Cole, and consequently the sister's whole case is left to depend on the single evidence of Baker. Johnson, *here*, as at the Old Bailey, only proves, that this female was living in 1819 and 1820; of her identity with Cole he still, as before, knows nothing; but from Baker's information. Had such been the fact, there could, I think, have been no dearth of witnesses to prove it. One of the sister's witnesses (a witness on her first allegation) is a woman named Shott. Shott and her husband were keeping a public-house at Woolwich in 1809, and there became acquainted with Gordon, who introduced Cole to this deponent, prior to his marriage with her; they were actually married from the house of this deponent, to which they returned after the ceremony, and at which they cohabited on the wedding night. The witness, Shott, then, could have clearly identified this female as Cole, had she really been Cole. Now it appears by her answers to an interrogatory that Shott actually accompanied the sister to Sheerness, and Chatham, *at the time the hand-bills were distributed*, at, and about, which very time, as deposed by Johnson, the female whom Baker as-

serted to be Cole, was seen, by that witness, at Chat-ham. Now Shott could have deposed to her identity with Cole, upon her own knowledge; and so have fortified Baker's evidence, not as Johnson does, which, is *really* no corroboration, but in truth and substance. And, yet of any attempt to confront Shott with this female there is no vestige in the case.

But how again does this single witness, Baker, stand before the Court in point of credit? In the first place, she is a witness brought in by an advertisement, intimating, that whoever will depose to a certain fact, shall entitle himself to a reward of thirty guineas. Had the sister attempted, by these means, to prove evidence in *this* cause, *immediately*, and in the *first* instance; I am warranted by the case of Pool v. Sacheverell (a), to which I have referred by counsel,

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(a) The case of Pool v. Sacheverell, in substance, was this. It was the case of a motion for the commitment of a party who had put forth an advertisement in the public prints, that whoever would discover and make legal proof against a marriage, in question in a suit then depending in the Court, (the Court of Chancery) should have 100*l.* reward. The motion being made before the Lord Chancellor (Parker), it was adjourned by him to the next seal, when he pronounced his opinion (in substance, as follows), *with great solemnity*.

This tends to the suborning of witnesses; is very dangerous; and not only greatly criminal, but is a contempt of the Court, being a means of preventing justice in a cause now depending—and as the Court may, so in justice it ought, to punish this proceeding.

It has been objected, that nothing has been done in consequence of this advertisement: that no witness has come in.

Resp. It does not appear but that some person would come in were this not discouraged: however, the person moved against

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in saying that it would have been a proceeding on her part, *highly* criminal, amounting, *itself*, to a contempt of the Court: and it may be safely left with every one for himself to determine whether the transaction in question is much alleviated, at least in point of *moral* guilt, by the circuitous course which has been adopted of producing her evidence to this Court, upon the present occasion. But I am principally considering the circumstance as it affects the credit of Baker—and it is clearly a circumstance which, in my judgment, renders Baker, at least, no *entire* witness in

has done his part, and if not successful, is still not the less criminal.

Obj. This is not an offer to any particular person.

Resp. It is the more criminal, as it may corrupt more. This advertisement will come to all persons, to rogues as well as to honest men—and it is a strange way of arguing to say that offering a reward to one witness is criminal, but that offering it to more than one is not so.

Obj. *A person coming in for such a reward is no witness, for his testimony must be rejected.*

Resp. It is so of every witness *suborned* or *bribed*—he is no witness, if you prove him bribed.

It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print, to procure evidence; and is tantamount to saying that such persons as will come in and swear, or procure others to swear, such a thing, shall have 100*l.* reward; and this in a cause now depending here. If 100*l.* is to be allowed, the same reason will hold as to allowing 500*l.* or 1000*l.* And though the intention of the person so advertising may be innocent (and I, knowing the man, Mr. Pool, believe it was so in this instance), yet the justice of the Court, nay, the justice of the nation, being concerned in so public a case, I cannot dismiss the party, though his counsel offer to pay costs to the other party; but in justice and for example's sake, he must stand committed.  
1 P. Wms. 675-8.

the cause, whatever might be its effect upon her testimony at the Old Bailey; on the trial for bigamy; which this Court does not presume to determine. Here, however, at least, in my judgment, it renders her no *entire* witness—she is, at least, a witness open to *suspicion*; and requiring to be corroborated, as upon this ground only.

But, further, an exceptive allegation has been given to Baker's evidence, after publication—pleading, *that* the female who cohabited with Owens, as deposed by Baker, was *not* the identical Harriet Gordon, formerly Cole, as she, Baker, had sworn, but *divers*—namely, a person occasionally passing by other names, but whose real denomination was Caroline Lindsel—and, further, pleading—that she, Baker, in May, 1821, subsequent to her examination, had been confronted, with Lindsel, when she admitted Lindsel *to be* the party of whom she had deposed, as cohabiting with Owens; at the same time admitting her *not to be* Harriet Gordon, formerly Cole, Gordon's first wife.

This allegation, it will be seen, is express to the *diversity* of the female who so cohabited with Owens, as well as exceptive to the testimony of Baker. The evidence to diversity taken upon this allegation, is defective, as I shall presently shew—yet still it is not without *great* effect on the testimony of Baker.—For Rawlins, a witness examined upon this exceptive allegation, deposes, that Baker, on being confronted with Lindsel, admitted her to be the female of whom she had deposed as cohabiting with Owens—only insisting, that Lindsel had passed herself to her as Harriet Gordon, formerly Cole, Gordon's first wife, whom Baker *then* admitted, that, *otherwise*, “*she had*

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*never seen.*" If, then, Rawlins is to be relied on; there is an end of Baker's evidence. He goes on to depose, that he prepared an affidavit to that effect, to be sworn to by Baker, which afterwards she declined making, "for fear," as she expressed it, "of getting into trouble, in consequence of what she had sworn at the trial."

The evidence to diversity, upon this allegation, is incomplete, as already hinted, for this reason—There is no *direct* evidence to this Lindsel, after all, not being Harriet Cole, Gordon's first wife. Of the three witnesses examined upon this allegation, Davis and Rawlins had never seen the first wife—and Brooks, the third witness, Cole's aunt, (a witness expressly produced to the diversity) only deposes to being introduced to a woman "*whom she is told is Caroline Lindsel,*" and whom she readily declares *not* to be Harriet Gordon, formerly Cole, her niece. But, owing, I rather presume, to some oversight, there has no witness been examined to prove, that the woman, so introduced to Brooks, was the identical Caroline Lindsell, Owen's paramour, deposed of, as such, by the other witnesses. Had this been done, the evidence to diversity, upon this allegation, had been complete. It is said, in explanation, that Lindsel herself was meant to be examined, but died in the interval—this, indeed, is explanatory of, but it does not directly supply, the defect—and the evidence to diversity upon this allegation is still, strictly speaking, incomplete. But as exceptive to the testimony of Baker, it is nearly conclusive—and in further apology for its defectiveness in the other particular, I am to recollect—that the *identity* not being pleaded, Gordon had no

opportunity of pleading the *diversity*, of the parties in question, *before* publication—and that *any* fact must not only be *pleaded* more restrictively in an exceptive allegation, than prior to publication, but that it must, also, be more strictly *examined* to.

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But I am, lastly, also to recollect, that a fact was pleaded by Gordon, decisive, in effect, as to the diversity of this female with Cole, and indeed of the whole case, prior to publication. For it was pleaded by Gordon, in the first instance, that Cole was admitted into St. Thomas's Hospital under the assumed names of Mary White, on the 6th of July, 1815—and that she died there, and was interred in the burial ground belonging to that hospital, in the course of that month,—That a female, so calling herself, died; and was buried, at the time, and place, articulate, is indisputably proved, and is undisputed. Is the identity of that female with Cole established in evidence? If so, that fact is decisive.

An attempt was made to prove this identity on the trial at the Old Bailey, which failed, as I have already said. But two additional witnesses have been examined to that identity in this Court, who positively depose to the fact—and who tell, I think, no improbable story. I allude to the witnesses Lister and Harrison. Lister deposes, *that* she had known Cole both before and after her marriage with Gordon—*that* she knew her to have been passing by the names of Mary White in the years 1813 and 1814—*that* she knew of her intention to apply for admission into St. Thomas's Hospital, prior to her being actually admitted—*that* she afterwards went to St. Thomas's Hospital, and inquired for her, as Mary White, and there saw her—

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this she says was in July, 1815, but she forgets the day—that she found her very ill, and promised to take her some tea and sugar, on the following day—but that, on the following day, when she went with the tea and sugar, she was told that “Mary White,” as they called her, had died on that morning—and she, Lister, then deposes that she was actually shewn the body, which she positively identifies as that of Cole, Gordon’s first wife. Harrison’s (her mother’s) account is in precise unison with this—the discrepancies between these witnesses are such as rather confirm, than impeach, the truth of their story; with which the evidence of Cowen, in substance, concurs. Here then are three witnesses distinctly proving the death of the first wife in 1815; and what is there to discredit Lister and Harrison? A jury has not disbelieved *them*, though it refused its credence to Cowen—and neither the general character, nor the particular testimony, of either of *these* witnesses has been excepted to; though the sister has given an exceptive allegation to the testimony of Phoebe Wood, a witness examined upon Gordon’s *third* allegation, whose evidence, comparatively, was of no moment in the cause. Had Lister and Harrison been produced at the Old Bailey, the verdict might, not to say must, have been different—and this Court would be justified to itself in arriving at a different conclusion from that of the jury, upon the new proofs now adduced, *were this at all necessary*.

But the Court is not placed in the predicament of being *forced* to arrive at any such conclusion, in order to sustain (if not his *interest*, technically speaking, as the husband, still) Gordon’s right to the deceased’s whole property. For a will is set up, giving the



whole property to Gordon—and the *factum* of that will is, I think, sufficiently proved. It is pleaded, on the other hand, that the deceased was incapable at the time, and was in Gordon's custody. It might be *sufficient* for the Court to state, on this part of the case, that the allegation of incapacity is one, which even the sister's own witnesses wholly fail to sustain. They are so various, so inconsistent, so overthrown by admitted facts in the cause, that the deceased's capacity is in no degree materially affected, even by their evidence. But, as opposed to the adverse case, the Court has no doubt of the deceased's full capacity. Far again from thinking the disposition improbable, as argued, or as, itself, indicative of duress, I think it much the contrary. The deceased had, prior to her marriage with Gordon, been in a weak and nervous state—resulting principally, it should seem, from the suicide of a person who was paying his addresses to her at that time, in 1815. But that she had sustained any attack of paralysis, prior to her marriage with Gordon, as pleaded, there is *no* proof. She resided with her mother in Foley Place till the death of the latter, in 1818—leaving the greater part of her property to this daughter, away from her other daughter, (party in this cause) who was living separate from her mother and sister (the deceased) in lodgings of her own. On the death of her mother, the deceased became a boarder in the family of Mr. William Gordon, brother of Thomas Gordon, in Grafton Street, with whose wife she had been previously intimate—and here it was that she became acquainted with Thomas Gordon, to whom she was married in the following September. That this marriage was brought about by

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any fraud practised upon an incapable person is fully disproved by the history of the marriage, and, particularly, by the marriage settlement—drawn up by a solicitor, as he deposes, from the deceased's own verbal instructions, and securing her property to herself, in as ample a manner, as the most cautious and wary person could require it to be secured. In short, it is quite preposterous to suggest, upon the evidence before the Court, that this was a marriage unduly obtained. Subsequent to her marriage the deceased is repeatedly taunted by this sister, with whom she had been previously on bad terms relative to *pecuniary* affairs, with not being the true wife of Gordon—for that he, Gordon, had a former wife living, to her knowledge, and whom she “could produce in a fortnight,” and more to the same effect, which is not worth repeating. That the deceased, a weak, nervous, woman, so taunted, and reproached, was often in tears, and distress, after her marriage—is not to be wondered at—any more than it is, that she withdrew, on one occasion, for a short period, from cohabiting with Gordon. The first of these circumstances infers no incapacity; nor does the latter, any ill-treatment of the deceased by Gordon, it being well to be accounted for by other considerations. In the spring of 1819, the parties went to reside at a house in Little Gower Place, where they continued to live for eight or nine months, during which, it is, I think, proved, that they lived on affectionate terms, and that the husband was kind and attentive to the wife: in particular, it is proved, that the wife kept the purse, and that she was jealous in maintaining, what she considered, her rights in that respect. It is

here that the will propounded is made—and that the deceased, so situated, should take the precaution of making this will, in order to secure her property to Gordon, at all events, is a circumstance that appears to me any thing but unlikely.

It is objected, however, that this will was not drawn up by her solicitor. Now, the deceased, who is spoken of as an extremely penurious woman, might object to employ a solicitor on the score of expence. Her marriage settlement was drawn up by a solicitor, at probably no inconsiderable cost—and the deceased might object to encounter a similar expence by the employment of a regular solicitor to make her will. Of one of the two subscribed witnesses, a person named Stromach, an intimate friend of the Gordons, being also the person who prepared or drew up the will, the Court has only evidence, but satisfactory evidence, to the death, character, and hand-writing—but the *other* subscribed witness, a young man, the husband's nephew, then about sixteen years old, an articled clerk to a solicitor, has been examined, and speaks to the *factum* of this will in a manner, which leaves no doubt upon the mind of the Court of this being a *bonâ fide* transaction, and having passed, in substance, as he represents it. The will, so executed, is delivered to Mr. William Gordon, brother of Thomas Gordon, and a trustee under the deceased's marriage settlement, for safe custody; and it is produced under the circumstances to which I have already adverted—as soon, in my judgment, as it was at all incumbent on the executor to produce it. Under these circumstances I have no difficulty in pronouncing for, and decreeing probate of, this will to Mr. Gordon, as executor, with-

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out *positively* deciding, it not being necessary to decide, that he has sustained his *interest*, as the husband of deceased. And thinking the sister's charge of incapacity disproved; and, at the same time, quite concurring with Mr. Gordon's counsel, in their observations on the gross impropriety of one of the means used by the sister to procure evidence in this cause, I condemn her in costs from the time of her allegation (pleading the incapacity of the deceased) given in in Easter Term, 1822.

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## TRINITY TERM.

## ARCHES COURT OF CANTERBURY.

The Office of the Judge, promoted by  
GATES v. CHAMBERS.

2d Session.

*(By Letters of Request from the Consistorial Court  
of Peterborough.)*

**THIS** was a cause of office, brought by letters of request from the Consistorial and Episcopal Court of Peterborough, and promoted by John Gates, esq. (a), against the Rev. James Chambers, clerk, curate of the parish of Willoughby, in the county of Warwick, and diocese of Litchfield and Coventry, touching and concerning his soul's health, &c. **ESPECIALLY**, for having "read prayers, and preached, in the parish church of Byfield, in the county of Northampton, and diocese of Peterborough, as the minister or curate of the said parish, on Sunday, the 14th of September, in the year 1823, without any licence or permission first had from the Right Rev. Father in God, Herbert, Lord Bishop of Peterborough, or any other competent authority"—and also—for having, thereby, "obstructed the Rev. Samuel Stanley Paris, clerk, the curate of the said parish of Byfield, duly licenced, in the performance of his clerical duties"—in violation of the 48th canon, and against the laws and constitutions ecclesiastical of this realm.

An allegation—responsive to articles filed against the defendant, a clergyman, for a violation of the 48th canon by officiating out of his diocese; as also, for obstructing a licenced curate in the performance of divine service—admitted to proof—from the probable tendency of the facts pleaded to render it, at least a case, for mitigated costs, if not to amount to a complete legal defence, as to both parts of the charge.

(a) Secretary to the Lord Bishop of Peterborough.

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The "*articles*," which were admitted without opposition (after pleading that "by the laws, canons, and constitutions ecclesiastical of this realm, no person in holy orders of the church of England can lawfully perform the duties of a curate, or officiate, as such, without the permission of the bishop of the diocese, or the ordinary of the place, having episcopal jurisdiction, first had and obtained, and reciting the 48th of the canons of 1603), went on to plead, *that*, on or about the 15th of July, 1817, Mr. Chambers, the defendant, was duly licenced to the curacy of Willoughby, in the county of Warwick, and diocese of Litchfield and Coventry, by the Lord Bishop of that diocese, on the nomination of the Rev. Nathaniel Bridges, DD. vicar of the said parish; (of which parish it was *afterwards* pleaded that the said Rev. James Chambers continued to be, on the 14th of September, 1823, and still, at the issue of the citation, was, licenced curate)—and *that*, on or about the 30th of November, 1822, the Rev. Samuel Stanley Paris, clerk, was licenced by the Lord Bishop of Peterborough, to the curacy of Byfield, in the county of Northampton, and diocese of Peterborough, to which *he* was nominated by the Rev. Charles Wetherell, clerk, the rector of Byfield; and *that*, on Sunday, the 14th of September, 1823, the said Rev. S. S. Paris, clerk, was, and continued to be, curate of Byfield, aforesaid, in virtue of the said licence. The articles then proceeded to object, *that* on the said Sunday, the 14th of September, 1823, the said Rev. James Chambers, still being curate of Willoughby, as aforesaid, did, without any licence or permission from the Right Rev. the Lord Bishop of Peterborough, or any other lawful

authority whatever, contrary to the ecclesiastical law, and canon aforesaid, take possession of the reading desk attached to the pulpit, in the parish church of Byfield aforesaid, and declare his determination to perform divine service in the said church—that Richard Sheppard, one of the churchwardens of the parish, thereon requested him to leave the said reading desk, and to permit the aforesaid Rev. S. S. Paris, clerk, the licenced curate of Byfield, to perform the duty—that the said curate, the said Rev. S. S. Paris, himself, also, remonstrated with the said Rev. James Chambers, and requested him to leave the said reading desk, and not to obstruct him, the said Rev. S. S. Paris, in the performance of his duty—warning the said Rev. James Chambers that if he persevered in his attempt, his conduct would be brought to the notice of the bishop of the diocese—but that, the said Rev. James Chambers, notwithstanding such remonstrance, and warning, refused to quit the reading desk, and did officiate, as the minister or curate of the said parish, by reading the service of the day, and preaching a sermon; and did thereby obstruct the said Rev. S. S. Paris, in the performance of his duty, as the licenced curate of the said parish. And the articles concluded by praying, that the said Rev. James Chambers, the defendant, might be duly and canonically punished and corrected according to the exigency of the law, and might be condemned in the costs of the suit made, and to be made, on the part of the promovent.

To these articles it was pleaded, *responsively*, on the part of Mr. Chambers the defendant, in substance,

*That* the Rev. Charles Wetherell, clerk, the rector

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of the parish of Byfield articulate, was, in the years 1822 or 1823, and still is, *resident* in the rectory house, and performing his duties, as rector of the said parish; *that* in or about September, 1822, the said Rev. Charles Wetherell engaged the Rev. Samuel Stanley Paris, clerk, to become his assistant curate in the said parish at an annual stipend of 100*l.*; such engagement to determine at the expiration of three months notice to that effect given by either party; *that* the said Rev. S. S. Paris, accordingly, was *nominated* to the Lord Bishop of Peterborough to be *licensed* to the said curacy; and was actually so licensed on or about the 13th of November, 1822; *that*, in such licence, the said Lord Bishop of Peterborough, without any nomination to that effect from the said Rev. Charles Wetherell, appointed the stipend of the said Rev. S. S. Paris at 120*l.* instead of 100*l.* (a) per annum; but *that* the said Rev. S. S. Paris declared, previous to entering upon his duty, that it was not his intention to insist on such increased stipend, but to abide by his engagement to serve the said cure for 100*l.* per annum only; *that* the said Rev. Charles Wetherell, being dissatisfied with the conduct of the said Rev. S. S. Paris as such (assistant) curate, did, on or about the 6th of January, 1823, express the same to the said Rev. S. S. Paris, upon which they *mutually*

(a) It should seem that his Lordship had conceived it, in the first instance, imperative upon him to assign, in the licence, a stipend of 120*l.* (from the population of Byfield, exceeding 500 persons) under 57 G. III. c. 99. s. 55. On becoming aware that that section of the act only applied to the cases of *non resident* incumbents, he reduced the stipend so assigned in the licence to that assigned in the nomination, viz. 100*l.* per annum.



agreed, to part at the end of three months from that time, or sooner, if agreeable to both parties; *that* subsequent to the said agreement the said Rev. S. S. Paris giving fresh offence, was, on or about the 24th of January, 1823, required by the said Rev. Charles Wetherell to quit his said curacy *immediately*, in consequence of which notice, he, the said Rev. S. S. Paris, absented himself on the following Sunday, the 26th of January, aforesaid, from the said church of Byfield; *that* on the Monday following, the 27th of January, the said Rev. S. S. Paris admitted to the said Rev. Charles Wetherell, that he had *neglected* his duty as well to the said parish as to a school for the education of the poor, established in the same, his services at which had been stipulated for, on his taking his said curacy; and expressed his sorrow for having given cause of offence to the said Rev. Charles Wetherell, who assured him of his forgiveness, but still required him to quit the said curacy at the expiration of three months from the said 6th of January; *that*, in the course of the same week, the father of the said Rev. S. S. Paris interceded with the said Rev. Charles Wetherell, for the continuance of his son in the said curacy; and *that* the said Rev. Charles Wetherell then consented to permit the said Rev. S. S. Paris to take part in the duties of the said church and parish till the expiration of the three months aforesaid, though at the same time, he positively refused to continue him as his assistant curate beyond that period, upon which understanding, the said Rev. S. S. Paris *was* permitted to take his share of the duty on the following Sunday the 2d of February; *that* the said Rev. S. S. Paris did *not* continue to be,

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and was not, as articulate, the curate of the said parish of Byfield, in virtue of the licence articulate, on the Sunday, the 14th of September, 1823; for that, from and after the expiration of three months from the said 6th day of the said month of January, he the said Rev. S. S. Paris was not the curate of the said parish, but had been dismissed from the said curacy as aforesaid; *that* on or about the 25th day of February, 1823, the said Rev. Charles Wetherell gave information to the Lord Bishop of Peterborough, that he had dismissed the said Rev. S. S. Paris from his said curacy, and requested that his licence might be withdrawn; and *that* he had, several times, tendered the said Rev. S. S. Paris his stipend, at the rate of 100*l.* per annum up to the expiration of three months from the said 6th of January; *that* the said S. S. Paris had not officiated in the said church or parish between the 2d of February and the 14th of September, 1823, and that the said Rev. Charles Wetherell had, himself, performed all the duty of the said parish during that period. [The above is the substance of the three first articles.] The allegation then pleaded, in substance, *that* the Rev. James Chambers, clerk, (the defendant) did not commit the offence or offences articulate, on Sunday the 14th of September, 1823, at the parish church of Byfield, as articulate; *that* on the said Sunday, he the said Rev. James Chambers attended at the said parish church to perform the morning service, pursuant to the request of the said Rev. Charles Wetherell, then absent from Byfield, in attendance upon a sick wife, at Malvern; *that*, previous to proceeding to the said church, the said Rev. James Chambers pro-

duced his licence from the Lord Bishop of Litchfield and Coventry, to William Farebrother, one of the churchwardens of the said parish, who accompanied the said Rev. James Chambers to the said church, and gave him possession of the reading desk; *that* before he had commenced the service, the said Rev. S. S. Paris came up to the said reading desk, accompanied by Richard Sheppard, the other churchwarden articulate, and desired to officiate, as curate of the said parish; declaring moreover that the said Rev. James Chambers, by persisting in doing the duty, would incur the displeasure of the Bishop of the diocese; *that* the said Rev. James Chambers then declared that he came there to do the said duty at the express desire of the rector, who had informed him that the said Rev. S. S. Paris was no longer his curate; and further declared, that, not being aware that he was offending against any law by merely assisting a friend in his absence, he should persist in doing the duty, though he disclaimed all idea of acting perversely, or in the spirit of defiance; *that* the said Rev. James Chambers then promised, at the instance of the said Rev. S. S. Paris, to admit at any time that the said Rev. S. S. Paris was then ready, and had claimed, to perform the service; on which they parted; and the said Rev. James Chambers proceeded to, and did, perform the said service, as requested by the said Rev. Charles Wetherell, the rector.

*The admission of this allegation WAS OPPOSED*, on behalf of the promovent, as neither justifying, nor even *much* extenuating, the charge made in the articles. That charge was said to be two-fold—a *violation* of the

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48th canon, involving the *obstruction* of a licenced curate in his undoubted right to officiate in the absence of his rector. Upon the offence first charged, the violation of the canon, the allegation was argued to have *no* bearing; the provisions of the canon being peremptory, that no minister shall “*serve*” in any place, but by *allowance* of the ordinary of the place; and such “*serving*” by the defendant, as charged in the articles, not being denied in the allegation. Consequently, the allegation was said to contain *no* justification of the alleged *breach* of the canon. As for that *other* offence charged, the obstruction of the curate, it was said—the allegation must be taken to *admit* that the bishop’s licence was not actually withdrawn; *until when*, a curate once licenced continues to be curate, by the general ecclesiastical law. Hence, so far from setting up any legal defence to *this* part of the charge, the allegation *admits* the *actual*, nay, even the *wilful*, obstruction of the curate—to be inferred, this *last*, from its being after *notice*, so *admitted*. Herein was said to consist (as laid down by Lord Mansfield, in the case of *Hyde v. Martyn* (a)) the distinction between a licenced, and an unlicenced, curate: the one is removable at pleasure: the other is not removable at the mere pleasure of the rector or vicar, but continues to be curate till the ordinary’s licence is revoked. And this was argued to hold, as well of an assistant curate to a resident rector or vicar, as of a curate, properly so called; namely, one who has “*curam animarum*” committed to him, *pro tempore*, by the bishop, in the absence of an incum-

(a) Cowper, 440.

bent. The ordinary, indeed, is bound to revoke his licence, on *reasonable* cause shewn; one of such *reasonable* causes, clearly, being, the rector or vicar's undertaking his own duty: and, failing to revoke his licence on reasonable cause shewn, this is matter of appeal, and complaint, to his ecclesiastical superior. True it is that Lord Mansfield has intimated (a), that curates, though licenced, are removable "*by* rectors or vicars undertaking their *own* duties." But by this it is not to be understood as if an incumbent, by undertaking his own duty, annuls his curate's licence, *ipso facto*. The incumbent is bound to certify this to the ordinary; who, being satisfied as to the duty being so undertaken by the rector or vicar, *bonâ fide*, is bound to withdraw his licence, as in the instance of any *other* reasonable cause shewn, on pain of appeal and complaint as above. This view of the subject was said to be the just result of the whole course of the ecclesiastical canons and constitutions, though it was admitted not to be fortified by the authority of any known decided case: and the opinion (said to be that of Mr. Serjeant Hill) expressed to the contrary; namely, "as though all but *perpetual* curates are removable at pleasure," in the notes on a late edition of Burn (b), was denied to be *law*. Upon these grounds the Court was prayed to reject the allegation.

*In SUPPORT of the allegation*, it was argued, on the contrary, that the facts alleged were *material* in answer to both parts of the charge. The canon was

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(a) In the case of Hyde v. Martyn, Cowp. 440.

(b) Burn's Eccl. Law, by Fraser, vol. ii. pp. 55, in *notis*.

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said, on the face of it, especially as viewed in connection with other canons, to have no reference whatever to ministers performing casual acts of duty in any place, without *allowance* of the ordinary of the place: but to be only applicable to ministers "*serving*" [that is, (so contended) taking *permanent* cures] without such *allowance*. Now, the "*serving*" charged in the articles was, here, *pleaded* to have consisted in the performance of a (*single*) casual act of duty. Hence, it was said, that the allegation was, at least, a good defence to that part of the charge which respected the supposed violation of the canon; to the penalties of which it was admitted that ministers taking *permanent* cures, without "*allowance* of the bishop of the diocese," might be liable. Nor had the allegation, it was maintained, a bearing less stringent upon that other part of the charge—the obstruction of a "*licenced curate*," so termed in the articles. The allegation upon that head went to shew that the curate's dismissal was held (rightly or wrongly) to have been legally effected by the rector at that time—above all, that the rector had, himself, done the whole parochial duty, without the curate's having officiated in a single instance, for the preceding seven or eight months. These facts constitute, it was said, a full defence, even as to this part of the case—being amply sufficient to justify the defendant from a criminal charge of having "*obstructed the curate*," for merely not consenting to compromise the (real or supposed) rights of the rector by surrendering the reading desk in this instance—although the curate (so styled) did, not improperly perhaps, put in his claim to officiate—evidently to keep open the question of right as between

him and the rector; a question with which the defendant properly declined to interfere. Even should the facts pleaded be held not to amount to a full justification of the defendant as to this part of the charge—still they are clearly relevant, it was said, to the extent of making this a case for *mitigated* costs—which was sufficient, of itself, to entitle the allegation to go to proof.

## JUDGMENT.

Sir JOHN NICHOLL.

The only question which the Court is at present called upon to decide is the admissibility of a defensive allegation, offered on behalf of Mr. Chambers, against whom a criminal proceeding has been instituted in this Court. The question for its ultimate decision will be, whether the defendant has committed an ecclesiastical offence for which he ought to be canonically punished, and also, to be condemned in the costs of the prosecution.

[Here the Judge described the offence from the *presertim* of the citation, and recited the substance of the articles, and of the defensive plea.]

Such is the substance of the charge, and such are the facts, stated in this allegation, (and which Mr. Chambers offers to *prove*, in his defence) the admission of which is now opposed. Nothing can be more widely different, in their character and effect than the representations made of this transaction; on the one hand, in the articles; and on the other, in this defensive allegation.

Is the allegation then admissible? for that, I repeat, is the only *present* question: in considering which I am bound, upon general principles, to assume the

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whole contents of the allegation to be true. And I am also bound to remember, that in this, as being a *criminal*, proceeding, the defendant is entitled to a full latitude of defence; and to state all circumstances (in order to examine witnesses to prove them) which can in any degree bear upon the ultimate decision of the matter charged, and its consequences.

The three first articles of the allegation state, and enter into a detail of circumstances in order to shew, that there were differences, at this time between the rector and his curate, upon a question, whether the curate had been legally dismissed, or whether he continued to be legally the curate, and to be entitled to his salary as such. In the present suit the Court will not be drawn aside, even to express an opinion incidentally, or indirectly, (for it cannot decide) upon the matter so in dispute between the rector and the curate; as to which of those parties is legally right in respect to the dismissal from the curacy without the bishop's having withdrawn his licence; though that point has occupied much of the argument that has just been offered at the bar. Meantime the fact that there was such a dispute existing does not appear to be, by any means, irrelevant, so far as it is pleaded; since it is explanatory of the whole transaction, and, at least, may bear upon the question of costs, which is not an immaterial part of the proceeding. In that view, if in no other, the three first articles of this allegation, applicable, in particular, by way of defence to that part of the charge which respects the "obstruction of the curate," are admissible.

The remainder of the allegation is also admissible,



partly on the same ground; though possibly, again, the case laid in the allegation, *taken as a whole*, may furnish a complete defence, if not to both parts of the charge, still, to that part of it which respects the supposed violation of the canon.

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The 48th canon, the violation of which is *principally* objected, so far as applies to the present question, is in these words—"No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese; or ordinary of the place having episcopal jurisdiction, in writing, under his hand and seal, having respect to the greatness of the cure, and the meetness of the party." And the canon is headed, "None to be curates, but allowed by the bishop." (a)

Now, the object of this canon *seems* at least to be, that curates who are engaged to take charge of parishes, either altogether or in part, *for a continued time*, shall be "examined and admitted" by the diocesan. What then is the history of the case, charged in the articles as a violation of the canon, which this allegation fur-

(a) This, in the Latin, is "*Ministri, nisi ex episcopi vel ordinarii approbatione, PRO CURATIS NON ADMITTENDI.*" And the canon itself is "*Nulli CURATO, aut ministro, permittetur, ullibi CURÆ ANIMARUM INSERVIRE, nisi prius per episcopum, &c. examinatus ac admissus fuerit.*"

The canons of 1003, it should seem, were originally framed in Latin—and the English translation is, in some parts, not by any means accurate. The original text should be always consulted in any case of apparent ambiguity. See, for instance, an apparent ambiguity at the close of the 106th canon, in the English translation, which the Editor remembers to have been the subject of much discussion, in the Donegal cause. There is no such ambiguity in the Latin canon.

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nishes? The rector of Byfield, himself a resident rector, engages a curate, not to take the entire charge of his parish, but merely to assist him (the rector) in fulfilling his parochial duties—he becomes dissatisfied with that curate, and dismisses him, *legally* as he conceives, after notice, pursuant to the terms of their original agreement. A question, however, arises between the rector and curate as to whether the latter has been *legally* dismissed—and is still subsisting at the period of this transaction. Meantime the rector, who, as incumbent, has the paramount right, does, himself, the whole duty for many successive months—he has then occasion to be absent *one* Sunday on account of his wife's ill health; and requests the defendant, a neighbouring clergyman, the licenced curate of another parish, but which parish happens also to be in another *diocese*, to officiate for him at Byfield, on that day. The defendant, so requested, attends and does officiate for the rector, notwithstanding the claim of a third person (Mr. Paris) to officiate *as curate*—he (Mr. Paris) being *the* curate who had been *licenced* to Byfield, and whose dismissal, whether legal or not, was the point at issue between him and his rector. Mr. Paris's claim to officiate is admitted in the plea: the defendant, however, it is also pleaded, though he declines surrendering the desk to Mr. Paris, promises to admit his *demand*; and disclaims all notion of violating the law, or acting in contempt of lawful authority—circumstances from which, in my judgment, it is fairly to be inferred, that his sole motives in *persisting* to officiate were, a natural reluctance to prejudice any (real or supposed) right of the rector; and a wish to leave the

dispute between him and his curate, unprejudiced by any thing that might take place at that time. Now, in this view of the case, I am by no means prepared to hold, that the defendant has committed any violation of the canon by which he becomes liable to a criminal prosecution.

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It may be very proper that *curates*, within the meaning of the canon, as already explained—and in which light the Court, as at present advised, is disposed to regard it—should be “examined and admitted” by the diocesan, in order to prevent persons, not duly qualified, from being introduced into parishes *in that character*. But the defendant in the instance in question, it should *now* seem, did not attend at Byfield, *in that character*; nor was he acting, *as curate*, within the meaning of the canon, so understood—he only came to officiate *for the rector*, on a particular occasion. That occasional assistance so given is punishable as an ecclesiastical offence, merely because the minister, *so* assistant, has not been licenced, *as curate*, by the bishop of the diocese, is more than, without further consideration, and other authorities being adduced, I am prepared to lay down as the rule of law: such a rule would be highly inconvenient to the clergy; and might not unfrequently occasion parishioners to be deprived, altogether, of the church service.

This interpretation of the 48th canon is confirmed, in my judgment, by the 50th and 52nd canons, which are *in pari materia*. By the first of these, the 50th, canon, “neither the minister, churchwardens, nor any other officer of the church shall suffer any man

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"to *preach* within their churches and chapels but such, as, by shewing their '*licence to preach*,' shall appear unto them to be sufficiently authorized thereunto." Now the 52d canon plainly implies that this "*licence to preach*," at least, was not required to be had of the *local* ordinary: for the entry directed to be made, by that canon, for the purpose of conveying information to the local ordinary in the case of a stranger *preaching* in his diocese, is, among other things, to set forth, the name of THE bishop by whom his "*licence to preach*" was granted. It appears indeed from the 49th canon, that the "*licence to preach*" referred to in these, the 50th and 52d, canons, was quite a distinct thing from the "*licence to a cure*," which is the subject of the 48th canon—being (the first) a licence to "*preach*" specially; without which ministers were forbidden, by the 49th canon, "to *expound*," as it is termed (*i. e.* to *preach*) "in their own cures, or elsewhere," or to do any more than "read plainly and aptly, without glossing or adding, the homilies (then) already set forth, or in future to be published, by lawful authority, for the confirmation of the true faith, and for the edification and instruction of the people." It is well known that such (separate) licences to preach were in use both before, and for some time after, the Reformation: but, for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into *desuetude*; and are now included either in "letters of orders" or in the "licences of ministers to particular cures." The defendant, it may be further observed, by the way, is pleaded to have actually complied, in effect,

with the 52d canon in this instance, by shewing his "licence" to the churchwarden; by whose authority, as well as by that of the rector, it now seems that he took possession of the reading desk, though he is charged by the articles to have done this, "without any competent authority whatever."

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Upon the whole, this allegation appears to the Court to be strictly admissible. It gives the transaction a character quite different to that to be collected from the articles of charge. It *may*, at any rate, protect the defendant from costs. It *may*, also, amount to a complete defence in point of law; not only excusing the defendant from costs; but subjecting the promoter to payment of the *whole* costs. The point in dispute between the rector and his curate will remain untouched. Under this possible result of the proceeding, whether the promoter may think this a fit prosecution to be persevered in, as a criminal suit, against this third party, Mr. Chambers, is a matter which he (the promoter) must decide for himself.

Allegation admitted. \* \*

\*.\* On a subsequent Court day, the proctor for Mr. Gates declared that "he proceeded no further:" upon which the cause was dismissed, with costs, as a matter of course.

The following proceedings in *another* Court may be stated as, in part, connected with the subject of this report.

In consequence of the existing disputes between Mr. Wetherell and Mr. Paris as to his dismission from the curacy of Byfield (stated and referred to in the *allegation* admitted, as above, in the Arches Court), Mr. Wetherell was served, in the month of May,

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1823, with a monition for payment of Mr. Paris's salary, *as curate*, to the following effect:

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*Monition.*

(Seal)  
HERBERT,  
PETERBOROUGH.

HERBERT, by Divine permission,  
Bishop of Peterborough, to the Rev.  
Charles Wetherell, rector of Byfield, in  
the county of Northampton and diocese  
of Peterborough, greeting:—Whereas the act of the  
57th of Geo. III. c. 99. s. 53. has provided, that in  
case any difference shall arise between a rector or  
vicar, and his curate, touching the curate's stipend,  
or the arrears thereof, the bishop of the diocese shall  
summarily determine the same; and is empowered to  
proceed therein by monition and sequestration. And  
whereas the Rev. S. S. Paris, whom we have licensed,  
on your nomination, to the curacy of Byfield, has  
represented to us that no stipend has been paid him  
since the 24th day of January last, and that you refuse  
to pay what has become due to him since that time,  
or any part thereof; we hereby monish you, the  
Rev. Charles Wetherell, to pay, within two-and-thirty  
days from the date of the service of this monition, to  
the said Rev. S. S. Paris, the whole amount of the  
arrears which shall be then due to him, or shew  
cause, within the same period, why payment should  
not be compelled by a sequestration of your said  
benefice. Such cause you will shew in writing, ad-  
dressed to us, and to be filed in our registry at North-  
ampton, within the time specified, agreeable to the  
provisions of the 26th and 76th sections of the said  
recited act. And, agreeably to the 75th section,

such cause may be shewn, either in the form of an affidavit, or in any other form of writing as the case may require. We shall then summarily determine the matter at issue.

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Given under our hand and seal, this 8th day of  
May, in the year of our Lord 1823 ; and of our  
translation the fifth.

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Mr. Wetherell, upon this, applied to the Court of King's Bench for a writ of prohibition to the bishop from proceeding to a sequestration of his benefice under that monition ; and a writ, *nisi*, was granted upon a *suggestion*, supported in the usual manner by affidavits, that the case, *as between rector and curate*, in which the *monition* issued, was not a case within the operation of the stat. 57 Geo. III. c. 99. s. 53.

That rule was made *absolute* by the Court of K.B. upon argument, in Trinity Term (3d July), 1824, the Court holding, *that* this process by monition, &c. against a rector for payment of arrears of stipend to his curate, *was*, as *suggested*, *not* well founded on 57 Geo. III. c. 99. s. 53, in the case in point of an *assistant* curate to a *resident* rector ; being *only* to be had in cases where the curate's *licence* had been *granted*, and his *salary assigned*, under that act ; which was held by the Court to apply solely, in these particulars, to the *curates of non resident incumbents*.

It is to be noted, however, that this decision of the Court of King's Bench *leaves* the general question, as to *licenced* curates being removable at pleasure, or the contrary, precisely on the footing where it stood before ; *be that footing what it may*. All which the Court of King's Bench has determined seems to be, that the *assistant* curate of a *resident* incumbent is not entitled to the benefit of a summary process by monition, &c. for the recovery of his stipend in arrear. This process by *monition*, &c. it should

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be observed, is clearly not according to the general course of the ecclesiastical law : consequently it is either *well* founded upon the statute, or it has no foundation at all.

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IN THE PECULIARS COURT OF CANTERBURY.

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By-day.

The Office of the Judge, promoted by

PALMER v. TIJOU.

Articles against the defendant (a sidesman) for brawling, &c. in church, pronounced to be proved; and the defendant suspended and condemned in the sum of 50*l.* *nomine expensarum* — this being held (in contradistinction to a former case arising out of the same general transaction) to be a case in which the prosecutor was not entitled to his full costs.

**THIS** was a cause or business of the office of the Judge, promoted by Samuel Palmer, a churchwarden of the parish of St. Mary, Newington, in the county of Surry, and deanry of Croydon (*a*), against Henry Michael Tijou, a sidesman of the same parish, for “quarrelling, chiding, and brawling, by words,” in the church of that parish; and also for “laying violent hands upon certain persons, and creating a riot and disturbance” in the said church.

The articles, nine in number, after pleading the general law (as in the case of Palmer v. Roffey, *vide* p. 141, *ante*.) pleaded, *that*, in the evening of Easter Tuesday, 1823, at the time of a poll taken in the church of St. Mary, Newington, for the election of a churchwarden for the year then next ensuing, Tijou, the defendant; perceiving that Richard Roffey, a churchwarden of the parish, was taken into custody by a constable, violently forced his way through the persons assembled, in order to release him, and in so

(*a*) Vide note (*a*), page 141, *ante*.



doing, smote, and laid violent hands on, divers persons; *that* on William Turner, a parishioner, gently laying his hand on his shoulder, and begging him, for God's sake, to be quiet, he, Tijou, swore at, and then, putting himself in a fighting attitude, aimed a violent blow at the head of, the said William Turner, who only avoided the same by stepping back; *that* after, in conjunction with others, effecting, in a violent and outrageous manner, Mr. Roffey's rescue from the constable, he, Tijou, on being remonstrated with by a Mr. Elisha Turner, aimed another blow at the head of the said Elisha Turner, accompanied with oaths, and divers quarrelsome, chiding, and brawling expressions; *that* he, the said defendant, then went into a pew adjoining that in which Mr. Hurcomb, a parishioner, was seated, whom he also violently abused and swore at; and at whom he clinched his first in a menacing and insulting manner; lastly, *that* he laid violent hands on a Mr. Samuel Bishop, also a parishioner, who only interfered by requesting him to be calm, and pushed him down, whereby he was seriously hurt; when, in consequence of such violent, and outrageous conduct, he was taken into custody by a constable. The articles likewise pleaded (as in the case of *Palmer v. Roffey*) that *this* prosecution was also instituted by vote or direction of the vestry.

A responsive allegation, consisting of eight articles, in substance pleaded, *that* Roffey, the churchwarden, was assaulted in the north aisle of the said church on the occasion articulate, and forced to the ground, and otherwise ill treated, by Mr. Hurcomb, and his friends, to the actual peril of his life; *that* Tijou, the defendant, who was then in the church-yard, hearing

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the tumult, and being apprized of the perilous situation of Mr. Roffey, proceeded into the church; and, with the assistance of other persons, succeeded in releasing him from the same; *that*, in so doing, he was obliged *to press through* the crowd assembled, but that he neither smote, nor laid violent hands upon, any person, or persons whatever; nor conducted himself towards William and Elisha Turner, and Joseph Hurcomb, articulate, in manner as objected to him in the articles; *that* soon after Roffey's release, and whilst he, Tijou, was standing on the seat of a pew in the said church, Samuel Bishop, articulate, pulled him down from such seat, and placed himself thereon in his stead; upon which he, Tijou, in like manner, displaced Bishop, and regained possession of the said seat; shortly after which, he, Tijou, and Bishop, mutually apologized, and shook hands. And *this* allegation also pleaded (as Roffey's had, in the former case) that Hurcomb and Richardson, two witnesses examined upon the articles, were themselves under prosecution—the one for quarrelling, chiding, and brawling, and the other, Hurcomb, both for this offence, and for that of smiting and laying violent hands, in the parish church of St. Mary, Newington, upon the day, and on the occasion, articulate (a).

Thirteen witnesses were examined upon these articles, and six, upon the responsive allegation. Of their evidence, which, though sufficiently bulky, was less so than that taken in the former case, the result on the mind of the Court, after hearing counsel on both sides, is stated in the judgment.

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(a) Vide note (a), page 143, *antc.*

**JUDGMENT.**

**Sir JOHN NICHOLL.**

This case of *Palmer v. Tijou*, and the former case of *Palmer v. Roffey*, arising out of parts of the same transaction, in which former case the Court noticed the general state of facts and the law applying to it, the present occasion does not require a repetition of those preliminary considerations. It will be sufficient to state, that in electing churchwardens for the parish of Newington in the year 1823, and while a poll was going on in the church, a quarrel arose between Mr. Roffey, one of the church-wardens, and Mr. Hurcomb, a parishioner; which quarrel continued at the polling-table a very considerable time; the terms "coward" and "informer" being repeatedly interchanged between them. Which of those two persons began the quarrel, or which was most to blame, appeared to be immaterial: both had grossly violated the laws existing for the protection of the sanctity of the place. This quarrel was followed by a still more violent disturbance between the same parties in the north aisle of the church; most of the persons present flocking there, being attracted by the noise and tumult. It is after the commencement of the disturbance in the north aisle, that the offence of Mr. Tijou is charged to have been committed: he was not at all engaged in the original quarrel, which led to the disturbance in the north aisle, nor was he present at the commencement of the latter. During the confusion, some of the by-standers called out for constables; and a constable had actually taken Mr. Roffey into custody.

It would hardly be proper for the Court wholly to

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pass over, without notice, a misapprehension which seems to have prevailed respecting the duties and authorities of the different parish officers. Most of the persons present, seem to have considered, that nothing special attached to the *place* in which they were assembled; that whether it was a church or a tavern, or a polling-booth, made no difference. There was a disturbance; the constables are called for, the cry is raised of "turn him out," and the constable, Wright, seizes the churchwarden, Roffey, and, soon after, the constable Passey seizes the sidesman, Tijou, pulling out his pocket staff in proof of his authority to do so.

Now the church itself, and the preservation of order in the church, is, *in the first instance*, under the protection of the ecclesiastical law, and the ecclesiastical officers. The Court does not mean to say, that, if an actual breach of the peace takes place in the church, and the ecclesiastical officers either neglect, or are unable to do their duty, or still more, if they call for assistance, the civil officer may not be warranted in interfering: but, in the first instance, it is the duty of the ecclesiastical officers to preserve order in the church: theirs is the primary authority. Who then are those officers? The churchwardens, and their assistants, the sidesmen. It is their duty to attend the church for the very purpose of preserving order. It is implied in their oaths of office "faithfully to discharge their duties as churchwardens," if they are dissenters from the established church, and from motives of conscience cannot attend its worship, they are allowed by law to serve the office by sufficient deputy. In the execution of this duty they are protected by law: for example, if they take off a man's hat in church, or if they turn an

obstinate disturber out of the church, without unnecessary violence, they are not guilty of an assault: They therefore are primarily the officers whose duty it is to keep order in the church. How far these considerations may aggravate the offence of Mr. Tijou, I am not at present inquiring: I notice them principally in order to say, that *constables* are called for upon this occasion, *earlier* than was *neccessary*, in my judgment, or consequently than was *justifiable*. Nor is the *alacrity* with which these constables seem to have acted quite uncensurable. Passey, for instance, takes Mr. Tijou into custody, and without any *requisition* to that effect. But the authority of Mr. Tijou, *in that place*, was paramount to the authority of any constable: and it must be a very strong case indeed which will *justify* a constable in inverting this order of authority by taking a churchwarden or a sidesman into custody; although possible circumstances may justify and require such a proceeding. The Court has stated thus much, not as of any great importance in the present case, but that the rights and duties of these officers, respectively, may be properly understood, and more generally known.

The first question in the case is, whether the articles charging the offence are proved: the matter of costs will be for after consideration. Upon carefully perusing the evidence, I am of opinion, that, although the articles state some of the facts in rather an inflamed manner, and there are some discrepancies between the witnesses, yet, upon the whole, it is established that the law has, to a certain extent, been violated.

When the disturbance in the north aisle commenced

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Tijou was not in the church : nor is it suggested that he had taken any part in the previous quarrel. The facts are these—Tijou, while in the church-yard, hearing the noise, comes into the church : and perceiving the disturbance, and the crowd, he forces his way through the crowd up to the churchwarden ; and if he had done this merely as a sidesman, intending to preserve order, it would have been justifiable : for his oath of office is “to be assistant to the churchwardens of his parish,” and the churchwarden at that time was actually engaged in a personal struggle, namely, with the constable. But it would be an excess of candour to suppose that Mr. Tijou was influenced, if by that motive at all, by that *sole* motive. Roffey, himself, at the time, far from being occupied in *preserving* order, was acting in gross violation of it : and the (principal, at least) object of Tijou’s interference seems to have been, to take part with a friend (Roffey), and to maintain *his* quarrel ; and not merely to discharge his own official duty. At all events, there is no sufficient justification of his language and conduct upon this occasion, whatever were his motives. The Court is therefore of opinion that the law has been so far violated, though the case is by no means of an aggravated character. The disturbance which was going on tends to extenuate the conduct of Tijou ; he was excited to that conduct by the existing tumult, and the situation of his friend. The original brawlers, Roffey, and Hurcomb, had kept up their quarrel for hours : they were the great offenders, and the cause of the whole disturbance. Many of the by-standers, probably, took a warmer part in the business than was strictly justifiable in point of law ; considering the respect that was due to the place

in which they then were assembled ; but to have instituted suits against all who might have so offended upon the occasion, would have been acting much too rigorously.

What afterwards passed with a person of the name of Bishop, took place also in the heat of the moment. Even according to Bishop's own account, he first put his hand on Tijou's shoulder, and though he did this in order to appease matters, yet Tijou, being so heated, might easily have mistaken it as an act of aggression and an assault ; but, according to Tijou's witness, Bishop first pulled him down by the coat from the seat of the pew ; and Tijou, in the same manner, pulled Bishop down, in order to recover his place ; though, unfortunately, on descending, Bishop's foot turned under him, by which he received some injury. The parties made up their private misunderstanding upon the spot, by shaking hands in token of forgiveness ; and although that immediate reconciliation might not conclude any person against proceeding for the purpose of maintaining public order, yet it is not wholly immaterial to the present consideration ; more especially in respect to costs.

Now, upon the point of *costs*, it is to be observed, that, generally, where an offence has been committed, the expence of correcting it is to be borne by the offender ; but it does not necessarily follow that *full* costs are to be given : they may be *mitigated* according to the discretion of the Court. That discretion however is not to be arbitrarily exercised ; but upon a just and impartial consideration of all circumstances. The conduct of *both* parties must be taken into consideration, in order to see how far the defendant

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ought to pay, and how the promoter has a claim to receive, *full costs*.

Two prosecutions have been instituted by Mr. Palmer. The prosecution against Mr. Roffey, the churchwarden, who had been guilty of brawling in the church for hours together, previous to this renewed quarrel in the north aisle, the Court held to be a case which called for *full costs*. But by that prosecution the sanctity of the place would be asserted; the law upon the subject would be ascertained and become known, and the example, to prevent the recurrence of the offence in the parish, would be made. If another person had equally offended, or with scarcely a shade of difference, it might have been invidious to select only one of them: both might have been properly prosecuted; but upon a view of the whole transaction, I cannot think that Tijou was the other person who ought to have been so selected.

As the public officer discharging his duty for the purpose of repressing such offences, Mr. Palmer was fully justified in the former proceeding; it was also advised and directed at a meeting of the parishioners. The churchwarden was not however bound to obey that direction—he was to judge of its propriety, for he becomes the party responsible to the Court and to the defendant: and although the Court is always disposed to protect public officers in the fair discharge of their duty, even if some error of judgment should occur, yet it is also the duty of the Court to protect individuals against the abuse of official station, and against being harassed with expence by an officer who may be supported by the parish purse.

From the evidence laid before the Court in these



two causes, the two principal offenders were Mr. Rofey and Mr. Hurcomb. Even if the former were the greater of the two, yet the latter, if a second prosecution were deemed necessary, was the *other* proper person to have been selected as the object of such prosecution. It is with regret the Court differs in opinion from so respectable a body as the vestry of this parish; but I cannot help, most conscientiously, differing from them on the present occasion. They direct a prosecution against Mr. Tijou, who was only a subordinate offender; while they do not direct any prosecution against Mr. Hurcomb; but, on the contrary, he is brought forward, not only as a witness in these suits, but as an active partisan, applying to some of the other witnesses to attend in support of it. Looking at this course of conduct, it seems to me impossible to consider the present prosecution against Tijou as having been instituted *solely* for its proper and legitimate object, namely, to protect the sanctity of the place consecrated and set apart for the worship of the Supreme Being; nor, impartially, to correct those who have offended against public order and decorum, without any regard to which party in parish politics the offender might belong. It therefore does not appear to be the case of a public officer acting without private motives in the discharge of his duty; which possesses a decided claim upon the justice and discretion of the Court, to indemnify him in his *full* costs, at the expence of the party proceeded against; but upon careful consideration, I cannot help thinking this to be a case for mitigated costs: and as Mr. Tijou will have his own expences to pay, which have been rendered pretty heavy, by the promoter's ex-

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amining a great number of witnesses; and as Mr. Palmer may, possibly, be indemnified by others of the parish, I shall content myself, in the first place, with suspending Mr. Tjou *ab ingressu ecclesiæ* for one week; and, secondly, by condemning him in 50*l.* *nomine expensarum*.

### IN THE PREROGATIVE COURT OF CANTERBURY.

1st Session.

AYREY and Others v. HILL.

A case of insanity *alleged* to defeat a will—testator proved to have been not, properly, a madman; but an habitual drunkard, who, under the excitement of liquor, acted in all respects, very like a madman—different considerations applicable to the two cases as with relation to the matter in question stated—testator held to have been not under the excitement of liquor, and, consequently, not insane, at the time of making his will; and the will itself, consequently, established.

### JUDGMENT.

Sir JOHN NICHOLL.

The case before the Court is pretty voluminous, in point of evidence; but there is much of it to which the Court has little occasion to advert in stating the grounds of its judgment.

The deceased, Peter Hurman, otherwise Efford (*a*), died on the 5th of August, 1821, leaving a will bearing date 25th of June in that year; the validity of which is the point at issue. The following is a summary of the contents of that instrument. It benefits, considerably, the family of Mr. Pike, one of the executors; it devises, and bequeathes, a freehold estate for life, together with the residue of the testator's personalty for life, to Lucy Hill, his niece and sole next of kin; and a legacy of 500*l.* to William Hill, her husband, in the event of his surviving her; it also be-

(*a*) The mother of the deceased had had two husbands—Hurman and Efford. The deceased was the son of the *first* husband; but chose to pass, and was usually known, by the name of the *second*.

queathes 700*l.* (100*l.* each) to seven different charities ; and 100*l.* each to the three executors, Mr. Ayrey, Mr. Pike, and Mr. Megginson ; whom, lastly, it purports to appoint joint (substituted) residuary legatees. Such, in substance, are the contents of this will (*a*) ; it is written on five sheets of paper, each of which is signed (the fifth being *also* sealed) by the testator ; and it is likewise subscribed by three persons, as witnesses, the solicitor who drew it up, and two neighbouring tradesmen, merely called in to attest the formal *act* of execution. The personalty bequeathed by this will is stated to amount in value to about 5000*l.* and the realty devised to between 5 and 10,000*l.*

This instrument, such as I have described it, is propounded by the executors, and is opposed by Lucy Hill, the testator's niece, and only known relation ; her alleged ground of opposition being, in a word, the asserted testator's *incapacity*. Her allegation, respon-

(*a*) The following is a correct abstract of the will, which it seems proper to state, for a reason that will appear in the sequel. Samuel Pike, 100*l.*—his four children 400*l.* 4 per cents—Sidwell Pike, his daughter, two freeholds, Aldersgate Street ; a leasehold, No. 8, Anderson's Buildings ; ground rents of twenty houses, ditto ; two copyholds at Plaistow—Orphan School ; Boy's School, Bethnal Green ; Brown's Charity School ; Deaf and Dumb School ; Hospital, Hyde Park Corner ; ten Widows at Orsett ; ditto at Plaistow, 100*l.* each—Lucy Hill (the deceased's niece) a real estate called " Squirrel's Heath Farm," and other real estates for life ; at her death to be sold, and out of the proceeds, 500*l.* to William Hill, her husband—Lucy Hill residue, for life—Samuel Pike, John Ayrey, and J. M. Megginson, substituted residuary legatees, and executors, with legacies (the two latter) of 100*l.* each. The *residue* (real and personal) was estimated, in the argument, at 7 or 8000*l.*

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sive to a *condidit*, pleads, generally, in the third article, that the deceased had long been subject to mental derangement, more particularly from about the middle of the year 1817; of which it furnishes a variety of (supposed) instances in the fifteen succeeding articles; summing up the whole by pleading, in the nineteenth article, that the deceased was not of testamentary capacity on the 25th of June, 1821, but, that he was in the custody, and under the controul, of the executors (one or all) at that time, upon whose sole suggestion the will in question, was, *de facto*, made and signed by the deceased. To this it is answered, on the part of the executors, that the deceased was never insane; for that he conducted himself rationally at all times, when not under the excitement produced by spirituous liquors, to the immoderate use of which, it may be stated, once for all, as an admitted fact in the cause, that the deceased had been addicted for a number of years.

Now this being, in substance, the case on both sides, it appears to me that the testimony of Mrs. Hill's own witnesses fails to make out a case of (*proper*) insanity, or mental derangement. They speak to the deceased's extravagant conduct indeed, in a variety of instances; but they admit him, in, at least, by far the greater part of these, to have been intoxicated at the time; when it does seem that he not only talked wildly and incoherently, but that he acted, and conducted himself, in all respects, very like a madman. Even Fagg, the witness who deposes most strongly in this particular, concludes by stating the deceased, in her apprehension, "a *mad drunken fool*;" obviously connecting, as appears by this phrase, in her

view of the case, his *supposed* insanity, with his admitted habits of gross intoxication. On the contrary, however, it is pleaded, and proved, that the deceased at no time was under any control as to the management of his person, or property; that he received rents; made payments; transferred stock; drew drafts; settled accounts; bought and sold property; in a word, that he was perfectly *sui juris*, to the last, with respect to the conduct both of himself and his affairs, in all particulars.

The testator's case then appears to the Court to be that of a person not (*properly*) insane or deranged; but to be that of a person addicted to a species of ebriety, which, during its subsistence, *frequently* produces, and is proved, in the present instance, to have *actually* produced, upon the subject of it, effects very similar to those which insanity, or mental derangement, (properly so called) would, or might, have occasioned. In other words, the deceased appears to the Court, not in the light of a madman, but in that of a person habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted, in most respects, very like a madman.

Now, viewed as with reference to the point at issue, the cases in question, notwithstanding their apparent similarity, are subject, in my judgment, to very different considerations. Where actual (*proper*) insanity is proved to have once shewn itself, either perfect recovery, or, at least, a lucid interval at the time of the *making*, must be *clearly* proved, to entitle any *alleged* testamentary instrument to be pronounced for as a valid will. Either of these however, the last especially, is highly difficult of proof, for the following

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reason. Insanity will often be, though *latent*; so that a person may, in effect, be completely mad or insane, however, on some subjects, and in some parts of his conduct, *apparently*, rational. But the effects of drunkenness or ebriety only subsist, whilst the cause, the excitement, visibly lasts: there can scarcely be such a thing as *latent* ebriety: so that the case of a person in a state of *incapacity* from mere drunkenness or ebriety, and yet *capable*, to all outward appearance, can hardly be supposed. Consequently, in the last, which in my judgment, is *this*, description of case, all which requires to be shewn is the absence of the excitement at the time of the act done; at least, the absence of the excitement in any such degree as would vitiate the act done; for I suppose it will readily be conceded that, under a mere slight degree of that excitement, the memory and understanding may be, in substance, as correct as in the total absence of any exciting cause. Whether, where the excitement in *some degree* is proved to have actually subsisted at the time of the act done, it did or did not subsist in the *requisite* degree to vitiate the act done, must depend, in each case, upon a *due* consideration of all the circumstances of that case itself, in particular; it belonging to a description of cases that admits of no more definite rule, applicable to the determination of them, than the one now suggested, that I am aware of.

In this view of the question before the Court, it must be obvious, that the result will depend, upon the deceased's state and condition *at the time* (to be collected, *principally*, from what passed *at the time*) of his giving instructions for, and signing, the instrument now propounded as, and for, his last will. But

previous to considering this it may not be improper that the Court should briefly notice one or two outlying circumstances.

And here, in the first place, I am bound to observe, that the *dispositive* part of this will has, to my judgment, nothing very alarming in point of probability. The deceased, in early life, had been for many years in the service of a Mr. Holker, (the uncle of Mr. Megginson) an attorney, who left him an annuity by will, which the deceased constantly received at Mr. Megginson's office. Hence, he appears to have considered himself connected, in a manner, with Mr. Megginson; and it is in proof that he frequently spoke of his regard for him, and his intention to benefit him at his death. The bequest, then, to Mr. Megginson, is one by no means improbable. Again, as to Pike and his family, the wife of the deceased died in February, 1820. During her life, the deceased had resided at Bethnal Green—he was much affected by her death, and took, upon that event, in particular, to a *course* of excessive drinking, which led to the commission of many of those acts of extravagance deposed to by the witnesses upon the niece's allegation. Soon after his wife's death (in the spring of 1820,) he went to lodge with Pike (whom he had previously known), at Anderson's Buildings, in the City Road, and became from that time, much attached to, and fond of, his children. It is *charged* that the deceased, while at Pike's, drank spirits to excess, and that Pike and his children, the latter especially, encouraged him in that pernicious habit; but this, admitting it to have been true, was a circumstance not likely to abate his fondness for them; though, itself, most undoubtedly, very

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highly reprehensible. In March, 1821, the deceased bought a house, and went to reside, at Dalby Terrace, (*also* in the City Road;) and was accompanied by Pike and his family; who remained, however, at Dalby Terrace about three weeks only, or till about the middle of April. But the deceased, himself, soon became dissatisfied with his purchase; and removed back to Pike's, in Anderson's Buildings, in the following June; a few days prior to the date of the present will. Under these circumstances, the *disposition*, so far as it benefits Pike and his family, is not by any means very unlikely. Even Mr. John Ayrey, the third executor, had been well known to the deceased from the year 1817—and, I think, that there are sufficient vestiges in the evidence, of mutual kindnesses between the parties, to relieve the testamentary benefit derived even to this executor, though, of the three, the one least connected with the deceased, from any charge of high improbability. The deceased had intrusted him with some charitable donations—and it appears, that Mr. John Ayrey was *also* executor of a *former* will, executed by the deceased, about six months before his death.

But how, again, was the deceased situated with regard to his family? for this is a circumstance by no means immaterial in estimating the probability, or the improbability, of this will, in the dispositive part of it. The deceased left one niece, the posthumous child of a brother by the half-blood, his sole next of kin, and only known relation. She, at that time, was forty years of age; and, though twice married, had never had a child. Now, the will in question is scarcely inofficious with regard to this niece: it bequeathes her a very considerable portion of the property for life; she



is the *general* residuary legatee for life: her husband too, though pleaded and proved to have been no favorite of the deceased, has a legacy of 500*l.* in the event of his surviving her. The probability of the niece ever having any child or children was too remote a one to be much contemplated: so that, the will's containing no provision for that event, but substituting *other* residuary legatees, strangers to the testator in blood, after her decease, is a circumstance, again, not at all extraordinary.

Lastly, of two at least of the three executors, and substituted residuary legatees, the will now propounded is not the deceased's *first* testamentary disposition in favor. Annexed to Mr. Megginson's affidavit of scripts is the draft of a will, prepared by a person named Durant, and executed by the deceased on the 21st of March, 1821: but the original of which does not appear. Now, from the contents of this draft, it appears that the will of March, 1821, was a will equally, if not more, in favor of Pike's family than that now propounded; and Mr. John Ayrey is an executor of *this* will, with a legacy of 100*l.* Between that time and the 25th of June, it is deposed by Combes (an adverse witness) that *he*, at the deceased's request, drew up a third (intermediate) will, from his *dictation*, which the deceased afterwards, indeed, refused to execute; although it was, probably, upon the occasion of his *dictating* this will that he destroyed the former will made by Durant. Of the contents of the will so prepared by Combes, there is no account—but the testimony of Combes (an adverse witness) on this part of the case, is express to the capacity of the deceased at that time, and to his intention to die testate; in which respects it is not immaterial.

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The only *direct* evidence as to the *factum* of the will now propounded, (independant of that of the two other subscribed witnesses, who merely speak to the formal act of execution), is to be found the deposition of Mr. Singleton, a subscribed witness, being also the solicitor who prepared, or drew it up. The following is a brief abstract of the *course* of the transaction, as represented in the evidence of this witness.

On the morning of the 25th of June, (1821) the witness attends the deceased, of whom he had previously no knowledge, in order to make his will, at the instance of, and in company with, Mr. John Ayrey, party in the cause, whom he had known well for the last four years. Ayrey says, the deceased had told him to "*bring his own attorney.*"—On arriving at Anderson's Buildings, they are shewn up to the deceased, who is ill in bed. The witness, after certain preliminaries which need not be stated, is accommodated with a chair, close to his bed side, near the pillow; and, Mr. John Ayrey continuing in the room all the time, gives the deceased to understand upon this, that he is ready to take instructions for his will. The deceased says, "I, Peter Efford, being of sound and disposing mind," but, stopping himself, adds, "you know what to say as well as I do." The witness proceeds accordingly, without farther dictation, to write the introductory part of the will; intimating to the deceased when it is that he arrives at the dispositive part, or the first bequest. The deceased then furnishes instructions, agreeably to which the witness reduces into writing the paper now propounded. The witness, in some instances, is obliged to make the deceased repeat his words, from his inarticulate manner of speaking—in some instances, names are *spelt*

by the deceased, the witness not knowing how to write them—and the christian name of one of Pike's children is ascertained, and communicated to the witness by Ayrey, the deceased himself not recollecting it. When the witness arrives at the *residuary* clause, the deceased desires that the residue shall be given to certain charities, to which he had bequeathed specific legacies in the former part of the will—but on the witness telling him, that real estate, part of the residue, is incapable of passing by will to charities, he says, after pausing for about a minute, as if reflecting how he shall dispose of it, “give the residue (meaning, *as the witness deposes*, the residue of his property, *generally*,) to the executors.”—The witness then proceeds with, and finishes the paper, which being done, it is audibly and distinctly read over to the deceased by the witness, who explains to him the purport and effect of certain parts of it, and the deceased says, that it is “all right.” It is then executed and published with the usual formalities, in the presence of the witness, and of two neighbouring tradesmen, who are called in to attest, and who, together with the witness, Mr. Singleton, actually do attest, the execution—Ayrey being also present, but, of course, not a subscribing witness. The witness then tells the deceased that “he shall get the will *done* in a more formal and regular manner, and be with him again in a day or two;” but he deposes, that he “can't recollect what the deceased answers, he, the deceased, being a good deal exhausted.” The witness upon this retires, keeping possession of the will. I shall have occasion to notice, in the sequel, all which occurs *subsequently*, between the deceased and this

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witness, that has any bearing, real or supposed, upon the validity of this will—as also to observe upon one or two *other* facts disclosed, and opinions expressed, by him, in the course of his examination.

This, in substance, is the testimony of the only direct material witness to the immediate *factum* of this instrument. It is obviously, I think, satisfactory—provided it be such as, in connection with the *res gesta*, and the face and appearance of the instrument itself, ought to satisfy the Court, as to the deceased's free agency and capacity (the contested points) at, and during, the particular period of time to which it relates.

And, first, as to free agency, the *res gesta*, as disclosed upon the face of this evidence, suggests nothing to my mind even of undue influence, much less of *actual* control. There is no appearance of conspiracy. One of the executors, Mr. Megginson, is in no degree implicated in, nor was even privy to, the transaction; and even Pike, the second executor, and with his family, principally benefitted under it, and at whose house it was executed, (being also, however, it is to be observed, the deceased's own *then* residence) takes no part whatever in the actual making of the will. Ayrey, the third executor, is present, indeed, but does not actively interfere—and, although the witness, Mr. Singleton, *was his* solicitor, and not that of the deceased, there is little to excite suspicion in the circumstance of the deceased choosing to employ his friend's solicitor upon this occasion, in preference to his own; especially it being considered that in the instance of neither of the two former wills prepared, the one by Durant, and the other by Combes, Mr.

Megginson's assistance had been, or apparently was intended to be, invoked. Lastly, the solicitor is not introduced to the deceased with a will ready prepared, merely in order to obtain a formal execution—he is introduced to receive, and actually does receive, instructions for a testamentary disposition of his property from the deceased himself—and when, added to all this, it is considered that the benefit at first intended to the executors was but slight, and compensatory for the trouble imposed upon them, and that instructions for making them the substituted residuary legatees were only furnished upon the deceased's being apprized that *real* estate, part, and the very principal part, of the residue, would not pass to charities, I do think that the *res gesta* disclosed upon this evidence is such, as to negative the charge that has been set up of fraud and conspiracy—and to evince the testator's free agency in the proper legal sense of that *term*, (if of sufficient capacity), at the time of the transaction.

And here, with respect, secondly, to the deceased's testamentary capacity at that time, (his general state and condition being, in my judgment, that which I have already described) it is surely not immaterial that the Court should advert to the time of day at which this transaction takes place. This transaction does not take place in the evening, when the deceased's habits were likely to be in operation (a circumstance, this again, which tends to negative the charge of fraud and conspiracy in the parties to the transaction), but at eleven or twelve o'clock at noon; when, if ever, it is to be presumed that the deceased was, and it was probable, *à priori*, that he would be, free, almost or altogether, from the

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effects of intoxication. Now, this being so, in the first place, does the instrument itself, upon the face of it, tally with, and by consequence sustain, the account given by the witness of the manner and mode in which it was drawn up and prepared? and, 2dly, how does it bear upon the stringent question, that of the deceased's testamentary capacity, at the time?

The will is written, as I have already said, on five sheets of paper; it has no appearance of a paper, taken as instructions merely, and subsequently converted into a will by a provisional, or precautionary, execution. Does this, then, falsify Mr. Singleton's account of the transaction? By no means. He had said that he was ready to "take instructions," &c.—but the deceased immediately commences with, "I, Peter Efford, being of sound and disposing mind," &c.—clearly indicating *his* intention, not merely to furnish instructions, but to dictate a final will. Consequently the formal shape of the paper is perfectly consistent with the witness's account of the manner in which it was prepared—and although, upon the face of it, it exhibits a fairer appearance (I mean, is written with fewer alterations and erasures, for *some* there are) than an instrument of this length, written at once, without any previous draft, would *ordinarily* exhibit; yet still I can easily conceive that an experienced solicitor, verging upon forty years of age, *might* well draw up such an instrument, at once, if the instructions were *clearly* conveyed; which it is likely that they were, in this instance, from that knowledge of testamentary forms for which the deceased was indebted to his employment for several years in an attorney's office; and from the circumstance of *two* prior wills then lately prepared: so that the disposition,

in point of general outline, may be presumed to have been fresh in his mind. In the instance of the will prepared by Combes, he speaks of it as a will, drawn up precisely as the instrument now propounded is deposed to have been—namely—from the deceased's "*dictation*." It must be admitted, however, that this appearance of the instrument does, at first, seem a little incongruous with the mode, deposed to by the witness of its actual preparation—and it was a circumstance, this, to which the Court directed the attention of the counsel for the next of kin, in order to have the benefit of their observations upon it in the course of the argument. The difficulty is, however, I think sufficiently removed by those considerations, suggested in the first instance, by the counsel for the executors, and now upon deliberation adopted by the Court, which have just been applied to it.

How, then, lastly—assuming (partly at least) for the present, the credibility of Singleton's narrative of the mode in which it was prepared—how does the face and appearance of the testamentary paper propounded bear upon the question of the testator's alleged testamentary capacity? Upon that head it is, I think, nearly conclusive. It is as complete a testamentary disposition of property as can well be conceived: it disposes of various properties—it bequeathes various legacies, and to various legatees—all these are minutely and circumstantially set forth—no error is suggested even as to any one of these particulars (*a*). It is quite impossible for the Court to pronounce that the person dictating such an instrument as this, in the

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(*a*) *Vide* note (*a*), page 207, *ante*.

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manner in which it was dictated by this testator, (if the witness, Mr. Singleton, is to be believed) was, as it has been contended, *non compos mentis*, or destitute, in any sense of the phrase, of testamentary capacity.

The sole remaining question, then, (one already indeed partly disposed of) is, ought the Court in this case to withhold its credence from Mr. Singleton's testimony? Now this witness is not only a person of unimpeached character, and sustained in his account of this transaction, in substance, as I have already said, by the appearance of the paper itself, and by the testimony, so far as it goes, of the other subscribed witnesses; but he deposes in one, and that one the most material, particular with an apparent openness and candour, which renders it imperative on the Court, in my judgment, to answer that question in the *affirmative*. He says, upon his examination, not only that the deceased spoke so inarticulately as to make a repetition of his questions necessary, but that, in a few instances, Mr. John Ayrey does interfere to suggest what it is that the deceased said; that Mr. John Ayrey did, on one occasion of the deceased's speaking inarticulately in the course of giving his instructions, say, "I think he is tipsy," or "I think he is drunk." And that he, the witness, "thought that the deceased was then, to a certain extent, affected by drinking spirituous liquors;" that, while the witness so took the instructions, the deceased calling for drink, a tumbler of rum and water was brought, which he sipt occasionally, though, the witness adds, "he observed no alteration in him in consequence of what he so drank." Lastly, this witness, though he speaks to his *belief* of the deceased's testamentary capacity at the time, disclaims the ability of



forming any absolute opinion "*how far* he was at that time *fully* capable of giving instructions for, and making and executing his last will and testament; or of doing any other act of that or the like nature requiring thought, judgment, and reflection." The Court has already arrived at its own conclusion, that he *was* so capable at the time, to the extent at least of entitling this instrument to probate—a conclusion not to be shaken or disturbed by this witness's *qualified* opinion as to his *possible* incapacity at that time, though a startling feature in the case, and fairly open, as such, to those observations which have been made upon it by the counsel for the next of kin. Meantime this, with the rest, appearing, too, as it does, in the examination in chief, and not merely drawn out by interrogatories, is clearly indicative of the witness's fairness and candour, and justifies the confidence reposed by the Court in his representation of *facts*—facts themselves again which being credited, seem, in connection with the rest of the case, fully to warrant that conclusion at which the Court thinks that it is bound to arrive.

Having pursued the inquiry thus far, the Court is not compelled to travel, in detail, through the evidence as to what *subsequently* took place. The following is an outline of this. Singleton tells the deceased that "he shall get the will *done* in a more formal and regular manner, and be with him again in a day or two." What the deceased then said, he cannot recollect; but he is neither proved to have given, nor is it probable that he did give, directions for any further instrument. The deceased was, he says, and might well be, much exhausted; this transaction having occupied from eleven or twelve o'clock,

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till three in the afternoon. The witness, however, on the same day (the 25th of June) proceeds with the will to a conveyancer's, who returns it, together with a draft will, on the 28th; with which draft will Singleton waits upon the deceased, on that same day. The deceased suggests alterations in this draft will on that day, and further alterations on the following day, the 29th of June, which being inserted, a will is engrossed for execution, and is produced to the deceased, in that state, on Sunday the 1st of July. The deceased kept that engrossed copy, but *postponed* the execution, and died, without any further act done, on the 5th of August. But these subsequent unfinished acts, in my judgment, are of no avail to defeat the regularly executed will. The execution of the will of the 25th of June was not a *provisional* execution, so far as the deceased was concerned, but a *final* execution—*this* was Singleton's *notion*, obviously not that of the deceased. Again, what passed subsequently seems to have *all* arisen from Singleton's distrust of the correctness of that will, as having been reduced into writing, *at once*, without any previous draft; and does not appear to have been sanctioned by, or to have proceeded from, any instructions, or directions, of the deceased himself.

Nor will the disposal of the residue having proceeded, in part at least, under a *possible* mistake, materially bear upon the question. Being told by Singleton that his *real* property would not *pass* to charities, he says, "give the residue (real as well as personal) to the executors." Why, it is said, was not the *personalty* given to charities? This bequest over of the residue to the executors, so far as *personalty* is

concerned, might (it has been argued *must*) have been founded on mistake or misconception. But such *possible* mistake is, surely, of no avail to *defeat* the will; nor is the Court either disposed or authorized to apply so subtle a test to the *trial* of its validity. The mistake, at all events, admitting it to be, is not of a *nature* to affect the niece. *Her* interest, at least, in the residue, either real or personal, the deceased never meant to extend beyond her own life. Meantime, the residuary clause having been drawn up in exact conformity with the deceased's own directions, and the will, when finished, having been read over to the deceased, and then executed, and attested, in the mode that I have described, the Court, in my judgment, can go no further. It appears to me to be the will of a free, and capable, testator; and, as such, I pronounce for it.

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DAVIS v. DAVIS and DAVIS.

1st Session.

**T**HIS was a business of propounding and proving by witnesses, in solemn form of law, a *second* codicil to the last will and testament of Edmund Thorp Luff, late of Berkley Place, in the parish of Clifton, in the county of Gloucester, esq. the party in the cause, deceased, which second codicil was *alleged* to have been lost, or unintentionally destroyed, but the substance of which was contained, as alleged, in a certain affidavit as to scripts sworn to by Henry Davis and Maria Davis (the wife of the said Henry Davis); promoted by Richard Hart Davis, esq. one of the executors named in the said will (praying probate of

Substance of a codicil pronounced for, in the absence of the instrument itself, upon satisfactory proof, 1st, that it was *duly made*; and 2dly, that (even if *cancelled*) it was *not revoked*, by the testator.

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the will and *first* codicil thereto) against the said Henry Davis, the *other* executor named in the will; and also against Maria Davis (wife of the said Henry Davis) the residuary legatee named in the said alleged second codicil.

His majesty's proctor had intervened in the cause on behalf of the crown; as, in the event of the codicil propounded not being pronounced for, the deceased was dead intestate, as to the residue of his property, and he was expressly alleged to have died without any known relation.

The circumstances of this case (which will be found detailed in the judgment) were pleaded in an allegation given in by the parties who propounded the codicil: and all the principal facts in the allegation, so far as the respondent's knowledge went, were admitted in the answers of the other party.

#### JUDGMENT.

Sir JOHN NICHOLL.

There can be no doubt that the contents or substance of a testamentary instrument may be established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him: for example, either by shewing that the instrument existed after the testator's death; or that it was destroyed in his life-time without his privity or consent. Many cases of the sort have been decided.

In the present case, the party deceased, Mr. Luff, died in May, 1823, a widower, without any known relation, at the very advanced age of eighty-five, leaving behind him property to the amount of about 4000*l*. He duly executed a will in May, 1818, thereby

leaving several legacies to charities, amounting, together, to about 2000*l.* He left also 50*l.* to each of his executors, Mr. Henry Davis, and Mr. Richard Hart Davis: but the will declared, that the residue was to be disposed of "by any paper signed by him which was to be a codicil thereto." In December, 1822, the deceased made a codicil, giving two legacies of 50*l.* each to Burton and his wife, (the persons at whose house he lodged) and 10*l.* to each of the children of those persons, but still not disposing of the residue.

It is pleaded, *that* the deceased had a very great affection for Mr. Henry Davis and his wife; and that in the beginning of April, 1823, he gave Mr. Henry Davis instructions for a codicil, bequeathing the residue of his property, undisposed of by his will, to Mrs. Henry Davis; *that* a codicil was to that effect prepared and duly executed, the substance of which is set forth in Mr. H. Davis's affidavit of scripts (*a*); *that*, after the execution, the deceased declared he should "*never alter it*;" and *that* the codicil was then folded up and put in a small box which stood in the deceased's room, in which he kept some papers, and various other articles.

Now the evidence, especially that of Fisher and Harris, the alleged subscribed witnesses, fully establishes that the deceased executed a codicil on this evening, in April, as pleaded; and I see no reason to doubt, that the contents of this codicil were as set forth in the affidavit. The deceased had no known relations whatever: his wife and his only son were

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(a) Vide note subjoined to the case.

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dead: he had no intimate acquaintances or connections except Mr. and Mrs. Davis; *they* were constantly treating the deceased with the utmost attention and kindness, and the deceased was, as constantly, expressing his gratitude towards them. There was no other person, therefore, in whose favor it was at all *likely* he should now bequeath the residue of his property, the disposal of which, by codicil, he had *expressly* reserved to himself in his will: he had already bequeathed about 2000*l.* in charities, to the several objects of his benevolence, at Bristol; and he had already, in the preceding December, made a separate codicil in favor of the persons in whose house he lodged. All his declarations to the Burtons and others, are fully confirmatory of his alleged intention to give the residue of his property to Mrs. Davis; and the daughter, Mary Ann Burton, indulging a little of that curiosity which is commonly attributed to her sex, actually perused a *codicil* to that effect, upon one day finding the deceased's "*trunk*" open; and she deposes to the substance of its contents(*a*). The tenor therefore of the codicil is proved by the probability of the disposition, by the declaration of the testator, and by a witness who actually read it.

But the instrument is not found upon the death of the testator; and as it was left in his own possession, the legal presumption is, that he himself destroyed it, *animo revocandi*. This presumption however, may be repelled by evidence; nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction.

(*a*) Vide note subjoined to the case.

The whole conduct of the deceased, and his declarations down to the very evening of his death render it most highly improbable that he should have *revoked* this codicil. Those declarations, having been detailed from the evidence by the counsel, need not be again stated by the Court. The codicil is proved by Mary Ann Burton to have been in the trunk already mentioned. It is also proved, that the deceased was a great smoker, and frequently took papers out of this trunk for the purpose of lighting his pipe: he was a very old man: and it is in no degree improbable that he may have taken the codicil out by mistake, and used it for that purpose. This is infinitely less improbable, than that he should have destroyed the codicil with the intention of revoking it.

It also appears, that the trunk was sometimes left open: that it was the receptacle of all sorts of things; and was accessible to other persons in the house. The codicil therefore might have been taken out, accidentally, or otherwise, neither by, nor with the privity of, the deceased. Upon the whole I feel morally convinced by the evidence produced, first that the deceased duly executed a codicil to the effect alleged: and secondly, that it was not revoked by himself; and therefore it is the duty of the Court to pronounce for its validity, as propounded. The probate must pass in the usual form, namely, "till the original, or a more authentic copy be brought in," for it is still not physically impossible, that the original may be in existence. \* \*

\*.• The alleged codicil, as stated in the affidavit of scripts, was as follows:—

"I, Edmund Thorp Luff, do hereby make this a codicil to my last will and testament: and do give and bequeath to Maria

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Davis, wife of Henry Davis, of Berkley Square, in the city of Bristol, solicitor, all the rest, residue, and remainder of my monies, chattels, and estate, to and for her own use and benefit, for her very great kindness and attention to me during my long illness. And I do hereby ratify and confirm my will in all respects, save as the same is hereby altered.

"Witness my hand, this                      day of April, 1823.

"E. T. LUFF."

"Signed, published, and declared, by the said E. T. Luff, as and for a codicil to his last will and testament, in the presence of us Jane Harris, James Fisher."

Mary Ann Burton, daughter of Mr. and Mrs. Burton, in whose house the deceased lodged, deposed, on the seventh article of the allegation propounding the codicil, in part, as follows:

"The deceased had a little box in his room, covered with leather, and very old, in which he used to keep a variety of things, but principally letters, scraps of poetry of his own making, and notes of sermons by different ministers; both which last, he was in the habit of taking occasionally out of the said box, the key of which he kept in his waistcoat pocket, and reading to the deponent:—once or twice the deponent has known the box to be left open, when the deceased had been reading, and had gone to lay down on the bed; and, on one occasion of this sort, happening about ten days or a fortnight before his death, she, the deponent, whilst *lingering* in the room, took up some of the papers so kept in the said box, and read them:—the first was a piece of poetry that she had seen and read before—the second was folded up as a letter, but with no writing or direction on the outside, and not sealed, and so she opened and read it—it was, she verily believes, the codicil to the deceased's will. It was, *as near as she can recollect*, for she read it but once, in the following words: 'I, Edmund Thorp Luff, give and bequeath to Maria Davis, wife of Henry Davis, my whole and sole estate and effects, for her kind attentions to me during my illness.' This she knows was the substance, though she will not undertake to swear that she has given the words correctly. It was signed by the deceased, and witnessed by Mr. Fisher and Mrs. Harris. When deponent *had* read it, she was sensible she had done wrong, and thought that the deceased might have seen her, and she immediately replaced the



said paper, and the others, in the box as she had found them; and came down stairs, without the deceased being conscious of what had happened."

The Court observed, in conclusion—"it has been usual, on similar occasions with the present, for the Court to pronounce for the instrument, as contained in the deposition, or depositions, of some witness, or witnesses." But since in the present case there can be no question that the contents of the instrument are set forth, at once more correctly, and less to the benefit of the parties who propound it, in the affidavit of scripts, made by those very parties, than in the deposition of the witness, Burton, I have no difficulty, on the present occasion, in acceding to the prayer of the parties, though out of the usual course, by pronouncing, as above, for this codicil "as contained in the affidavit of scripts."

His majesty's proctor prayed that the costs of his appearance, as such, might be paid out of the estate. In objection it was said that the "Crown neither took nor paid costs," but

*Per Curiam.* That rule is not, I think, applicable to an appearance given by the Court under the present circumstances, and I direct the costs of that appearance to be paid out of the estate.

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Term.

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MEDLYCOTT v. ASSHETON.

7th July.

**T**HIS was a question as to the validity of a *codicil* found uncanceled among the papers of the deceased. Her *will* had been cancelled in her life-time; unquestionably, by order of the deceased.

JUDGMENT.

Sir JOHN NICHOLL.

The testatrix in this cause, Miss Catherine Cockayne, died in March, 1824, at the house of her relation Mr. Maunsell, where she had been previously resident two or three months. The deceased was possessed of personal property to the amount of above 2000*l.* and was entitled to a ninth share of some real

The ordinary presumption that a codicil to a will is revoked by the revocation of that will, held not to be sufficiently rebutted by circumstances, shewing a *different intention*, and the testatrix, consequently, pronounced to be dead intestate.

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ASSETON.

property. She left behind her the honorable Barbara Cockayne Medlycott, widow, her mother, and eight sisters, the parties entitled in distribution in case she is dead intestate.

In April, 1820, the deceased executed a will which she deposited for safe custody, in the hands of a Mr. Smith, described as the steward of the family. In December, 1820, she wrote a codicil, giving 100%. each to the two "trustees" named in her will, and dividing some trinkets among her family. In the month of January last (1824) she looked over the papers in her writing-desk, several of which she burnt (it is to be presumed) as useless; and *a few days afterwards*, wrote to Mr. Smith desiring him to destroy her will. This is admitted not to have been done with the intention of making a new will; for she neither expressed, nor is there reason to suppose she entertained, any such intention. Mr. Smith, upon receiving the letter, shewed the envelope containing the will, with the seal unbroken, to a third person; and immediately, in his presence, put the will into the fire, unopened, where it was burnt, and wrote to inform the deceased that he had obeyed her directions. Upon the death of the deceased, Mr. Smith's letter is found in her writing-desk, the uppermost paper; and lower down, in the same desk, among other papers, the codicil of December, 1820, is also found, uncanceled. These are the facts of the case: and the Court is to decide whether this codicil is valid, or whether it is revoked.

A codicil is, *prima facie*, dependant on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases, where the codicil has appeared so independant of, and uncon-

nected with, the will, that, under circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of *intention*. Consequently the legal presumption in this case may be *repelled*, namely, by shewing, that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of *this* case are not sufficient to establish such an intention, in order to repel the legal presumption. The codicil in this case appears connected with the will ; for the principal legatees in the codicil are "her two trustees" being such under the will ; and, the will being revoked, they no longer retain that character. Even the distribution of the trinkets made by the codicil might be influenced by the disposition contained in the will.

It seems probable, that the deceased *last* saw the codicil when she put her desk in order, and burnt some of her papers : but that was done *before* she sent directions to have her will destroyed. And even if she had *then determined* to cancel it, she might not choose actually to destroy the codicil, till she knew her directions to Mr. Smith had been carried into effect. Afterwards, when she received Mr. Smith's letter, which she deposited at the top of her desk, she either might not think of the codicil, or might not deem it necessary to destroy it ; under the more common idea that a codicil is dependant on a will. Under these considerations I am of opinion, that the legal presumption of the codicil being revoked by the cancellation of the will, is not sufficiently repelled by circumstances shewing a different intention in the testatrix, and, consequently, that she must be pronounced to be dead intestate.

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Trinity  
Term.

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IN THE GOODS OF MARY RADNALL, SPINSTER,  
DECEASED.

4th Session.

(On Motion.)

When a sole next of kin refuses to take administration, the Court, on cause shewn, will decree letters *ad colligendum bona defuncti*, limited according to the special circumstances of the case.

**MARY RADNALL**, of Bewdley, in the county of Worcester, the party deceased in this cause or business, died in September, 1823, a spinster, without parent, and intestate, leaving behind her Francis Radnall, her natural and lawful brother, and only next of kin, and the sole person entitled to her personal estate and effects. The deceased's property, consisting principally of money due to her on mortgage, and by bond, leasehold estates, cash at her bankers, &c. amounted to about 3,700*l*. The deceased was also entitled to an undivided moiety, of certain leasehold property in Bewdley, as also of some freehold property, of which, she, the deceased, and her brother, Francis Radnall, were tenants in common. She died without leaving any other than a few trifling debts, which were immediately discharged by her brother, Francis Radnall, out of his own property.

Subsequent to the deceased's death, various applications had been made to Francis Radnall, by Robert Pardoe, who had been agent for the said deceased during her life, and still was agent to the said Francis Radnall, relative to his taking out administration of the deceased's effects; but the said Francis Radnall, (on being informed that, in case of an administration, an *oath* must be taken faithfully to administer the effects, and as to the value thereof) positively declined, either himself to take the said letters of administration, or to take any step whatever for enabling any

other person so to do, on the score of *all* oath-taking being contrary, and repugnant, to his religious opinions.

Mr. Pardoe, and his partner Mr. Nicholas, were also agents and solicitors to the executrix of Henry Lancelot Lee, esq. deceased, whilst living indebted to the deceased, on bond, in the sum of 500*l.*; Mr. Pardoe being also a trustee under his will for the sale of his estates for payment of his debts. Those estates had been sold accordingly: the money was now ready for payment of the said sum of 500*l.* so due on bond to the deceased's estate; and inconvenience and loss were accruing to the estate of the said Henry Lancelot Lee, in consequence of there being no person legally authorized to receive, and give a discharge, for the same: nor could he, Mr. Pardoe, for the same reason, though willing and desirous so to do, settle his accounts with the estate of the deceased, and obtain a proper discharge for the balance thereof.

The above facts being duly verified by the affidavit of Mr. Pardoe, the Court, on motion of counsel, was pleased to direct a citation to issue, calling on the said Francis Radnall to accept or refuse the letters of administration of all and singular the goods, chattels, and credits of the said deceased: otherwise, to shew cause why the same should not be committed and granted to the said Robert Pardoe, *limited* to "the collection of all the personal property of the said deceased; and giving discharges for all the debts which might have been due to her estate, on payment of the same; and doing what further might be necessary for the preservation of the property aforesaid:" and; to "the safe keeping of the same, to abide the directions of the Court."

1824.  
Trinity  
Term.

IN THE  
GOODS OF  
MARY  
RADNALL.

1824.  
Trinity  
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4th Session.

GALE v. LUTTRELL, and Others.

(On Petition.)

The executors of a deceased executor, though not the personal representatives of the original testator (there being an executor of the original testator still surviving) are compellable to bring in an inventory of the effects of the original testator.

The Court will compel an executor to bring in an inventory, &c. at the suit of a creditor by bond of the testator, notwithstanding its alleged invalidity, and a suit as to this, actually commenced, and then depending, at common law.

**JOHN FOWNES LUTTRELL**, late of Dunster Castle in the county of Somerset, and of Northway, in the county of Devon, was the party deceased. He made his will and appointed four executors, two of whom only, John Fownes Luttrell and Francis Fownes Luttrell took probate of the will, namely, in May, 1816: of these Francis Fownes Luttrell was since dead, having made *his* will, and thereof appointed Henry Fownes Luttrell, and Frederick Moysey, esquires, executors, who took probate of the said will of Francis Fownes Luttrell, in May, 1823.

In Michaelmas Term, 1823, a decree issued, citing John Fownes Luttrell, Henry Fownes Luttrell, and Frederick Moysey, esquires, to exhibit an inventory of the effects of John Fownes Luttrell (the *original* testator, and an account of their administration thereof) at the suit of Mary Gale, administratrix (with the will annexed) of William Hawkes, whilst living, a creditor of the said *original* testator.

An appearance was given to this citation under protest as to Henry Fownes Luttrell, and Frederick Moysey; and the Court was prayed to pronounce for that protest, on the ground, that, there being, still living, an executor of the original testator who had proved his will, they, the said Henry Fownes Luttrell, and Frederick Moysey, though the executors of a deceased executor, were not the personal representatives of the said original testator, and, consequently, were *unduly* cited to

render an inventory and account of his effects. As to the surviving executor Mr. John Fownes Luttrell, it was prayed, that, under the circumstances stated in an act of Court into which the protest was extended, the Court would further, in its discretion, *decline*, assigning *him* to bring in the inventory and account called for; until a question stated to be then depending in the Court of King's Bench as to the validity of a bond, under which the party at whose suit the citation had issued, claimed to be a creditor of the deceased, should have been determined, in the *affirmative*, by that Court.

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~  
GALE  
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LUTTRELL.

This act of Court, or extended protest, was replied to on the part of Gale the creditor, to the effect stated in the judgment, and the cause, after argument by counsel, now stood for sentence.

## JUDGMENT.

Sir JOHN NICHOLL,

Gale, as a creditor of John Luttrell, deceased, has cited his son, John Luttrell, his surviving executor, and Henry Luttrell and Frederick Moysey, the executors of Francis Luttrell, another of his executors since deceased, to exhibit an inventory: an appearance for the parties cited has been given under protest: and in the act on petition, extending the protest, it is stated, that the validity of the bond, under which Gale claims to be a creditor, is controverted, in an action brought in a Court of common law; and further, that the executors of the *deceased* executor, are not bound to exhibit an inventory, there being a *surviving* executor.

To this it is replied, *that* Francis, the deceased executor, received a considerable portion of the *testator's* effects; *that* both executors had recognized the bond

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after the death of the testator: and *that* in the action brought against John, the surviving executor, *he* had pleaded "*plene administravit*." The Court is now to decide, whether the parties cited are bound to exhibit an inventory.

An inventory is due from an executor or administrator almost as matter of course, at the prayer of any person having the appearance of an interest: though, in modern practice, inventories are not *required* to be exhibited, without being so called for.

In respect to the party calling for the inventory in this case, here is an asserted creditor by bond:—this Court will not enter into the validity of the bond: it is sufficient that such a claim is put in suit against the executor. And as the executor has *pleaded* "*plene administravit*," it furnishes the strongest reason to entitle the creditor, before he proceeds farther in trying the validity of the bond, to *ascertain*, by the production of an inventory, whether the deceased left assets to answer his demand. The *surviving* executor is therefore cited by a party, having an apparent interest sufficient to entitle him to call for an inventory.

In respect to the executors of the *deceased* executor, Francis Luttrell, though they are not the representatives of the first testator, there being a surviving executor, yet, being called upon as representing another executor, who took probate, and who is stated to have got possession of a considerable part of the deceased's effects, the creditor has an interest sufficient to entitle him to call upon them *also* for an inventory: since, without a disclosure from them of such parts of the first testator's property as came to the possession of the *deceased* executor, Francis, the creditor is still without



means of finally ascertaining what assets his debtor has left ; as those assets *may be* unknown to the *surviving* executor.

Protest over-ruled—John Fownes Luttrell assigned to bring in an inventory, and Henry Fownes Luttrell and Frederick Moysey assigned to appear absolutely—and question as to costs, reserved.

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PAUL v. NETTLEFOLD.

By-day.

## JUDGMENT.

Sir JOHN NICHOLL.

In this case an inventory is called for, from an executor, by a co-executor, but who is also sole residuary legatee.

An executor  
(at least one  
who has a *special*  
interest)  
may call upon  
his co-execu-  
tor for an in-  
ventory.

It is objected to, on the ground that “an executor cannot sue his co-executor”—but the rule does not apply. The party calling for an inventory in this case, does not call for it, *as* co-executor, but in the character of residuary legatee. Those characters are quite distinct: so much so, that a person who possesses both, and wishes to decline being the representative of the testator, must renounce, as well the probate, in the character of executor, as the administration, with the will annexed, in the character of residuary legatee. As residuary legatee the party has the greatest interest in ascertaining what effects the testator left behind him; the whole of which effects may have got into the hands of the co-executor, without the knowledge or privity of the residuary legatee. I therefore see no ground in principle, nor has any

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authority, (indeed quite the contrary) (*a*), been produced, by which a residuary legatee, though also

(*a*) The following case, cited in the argument from a manuscript note of Dr. Bettesworth, would go to shew that an executor, as such merely, or without any *special* interest, might call upon his co-executor for an inventory.

1735-6.  
Hilary  
Term.

2d Session.

### IN THE PREROGATIVE COURT OF CANTERBURY.

#### HUGGINS v. ALEXANDER.

MR. ALEXANDER died, leaving children, minors; and made his will, whereof he appointed his wife, Mr. Huggins, and another person, executors. The wife possessed herself of all the effects, and refused to give Mr. Huggins any account. Huggins thereupon cited her to give an inventory; and the question now was, whether, where two executors have taken probate jointly, one can call the other to bring in an inventory.

Dr. Strahan, for Mrs. Alexander, said—the deceased appointed his wife guardian to his children; and allowed her to dispose of 6000*l.* among the children, in such proportions as she should think fit. Executors and trustees by the will are not responsible for any involuntary acts or losses, but only for their own acts. *One executor cannot sue another*, [Swinburn, part iv. s. 20.] *unless he has a special interest in the estate.* Mr. Huggins hath nothing in the will, nor any interest.

Dr. Paul, for Mr. Huggins. There are three executors, and two trustees named in the will; and, by the will, the executors and trustees, or one of them, are to consent to the marriage of the minors. Huggins had an interest, as executor; and in Chancery, one executor can sue another. In the Prerogative, February 6, 1726, Thomas Duck made an executor and an “overseer”—the “overseer” prayed a “commission of appraisement,” and the Court decreed an inventory. Hugh Nash died at Paris, and left two sons, Hugh and Gyles, co-executors. Gyles prayed an inventory from the other; and it was granted in the Prerogative. Hugh appealed to the Delegates; but afterwards deserted his appeal, on September 8th, 1727.

Court. [Dr. Bettesworth.] Where minors are concerned, the Court doth often; *ex officio*, order an inventory. There is no pre-

possessing the character of executor, is deprived of the right of calling upon the other executor for an inventory, and consequently I over-rule this objection.

Objection over-ruled, and an inventory ordered.

vision in the will, in case of the wife's second marriage. Huggins has taken probate; and, if she should die, he, as surviving executor, will be accountable. It is said, that a co-executor, *before probate*, may call for an inventory; and he is then as much an executor as afterwards. The question is, whether Huggins has not an interest, *merely as executor*, sufficient to entitle him to a discovery of the estate. I am of opinion that he has; and therefore decree Mrs. Alexander to give in an inventory.

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Trinity  
Term.

PAUL  
v.

NETTLEFOLD.

### GREENOUGH v. MARTIN.

By-day.

**JANE GREENOUGH**, late of St. John's Wood, Mary-le-bone, in the county of Middlesex, the party deceased, died on the 14th of February, 1824.

The deceased, by her last will and testament, bearing date on the 30th of March, 1821, gave to her butler, Henry Martin, 800*l.*, if he should be living in her service, or in the joint service of herself and her nephew, Mr. George Bellas Greenough, (with whom the deceased then was, and continued to be, resident till she died) at the time of her decease—and to her servant, formerly Elizabeth Fletcher, but then Martin; wife of Henry Martin, a like legacy of 800*l.*, upon the same condition, subject also to which she *farther* gave, to Elizabeth Martin, an annuity for life of 50*l.*;

A will and codicil pronounced *for*; and three intermediate codicils, pronounced on behalf of legatees in the same, held to be invalid.

In a Court of Probate, what instruments the testator meant to operate as, and compose, his will, is to be collected from all the circumstances of the case.

1824.  
Trinity  
Term.

GREENOUGH  
v.  
MARTIN.

and, to Henry and Elizabeth Martin, 15*l.* each for mourning.

The deceased, in the interval between the 30th of March, 1821, and the 30th of December, 1823, made four codicils to her will, in favor of this same Martin and his wife.—These codicils were wholly written by the deceased, although she was quite blind; owing to which they were nearly illegible, and not to be decyphered without *great* difficulty, *viz.*

A codicil, dated May, 1821, by which she gave them 200*l.* each—*over what she had left them by her will.*

A codicil, dated January, 1822—by which she gave them 400*l.* each—*over what she had left them by her will.*

A codicil, dated 4th September, (without any year, but, probably, 4th September, 1822, by which she gave to Elizabeth Martin, the wife, her “round silver salt spoons”—and

A codicil, dated “December, 1822,” by which she gave to Henry Martin 500*l.*—likewise to Elizabeth Martin 500*l.*—*without any mention of her will.*

On the 30th of December, 1823, the deceased made and executed a codicil to her will, under the circumstances (pleaded and proved on the part of her executor, Mr. Greenough,) which are stated in the judgment. By this codicil she expressly says, “I revoke the several legacies given by my will to the “servants in my service, or in the joint service of my—“self and George Bellas Greenough, at my decease—“excepting those to Henry Martin and Elizabeth “Martin, his wife. The legacies of 300*l.* and 300*l.* “which I have, by my will, given to Henry Martin

" and Elizabeth Martin, his wife, I hereby increase to  
 " 1000*l.* sterling each—the said legacy of 1000*l.* to  
 " the said Elizabeth Martin, to be in addition to the  
 " life annuity of 50*l.* provided for her by my will.  
 " And I further, and additionally, give to the said  
 " Henry Martin and Elizabeth Martin, 15*l.* each, for  
 " mourning—such annuity and legacies to the said  
 " Henry Martin and Elizabeth Martin, to be payable  
 " only in case they shall be in my service, or the  
 " joint service of myself and Mr. Greenough, at the  
 " time of my decease." And the following clause is  
 then added. " My said will, having been this day  
 " read over to me, I hereby confirm the same, except-  
 " ing as to any legacy that may have lapsed by reason  
 " of the death of any legatee or legatees."

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 Trinity  
 Term.

GREENOUGH  
 v.  
 MARTIN.

On the part of Mr. Greenough, her executor, it was contended, that under the circumstances so pleaded and proved, the codicils previously made by the deceased in favour of Mr. and Mrs. Martin, and now propounded in their behalf, were revoked by this codicil of the 30th of December, 1823. The allegation propounding the codicils opposed by the executor, only pleaded (in addition to hand-writing and capacity) the period (as stated in the judgment) during which Martin and his wife had been in the service of the deceased—that the deceased reposed an entire confidence in them, and constantly entertained and expressed for them a great regard and affection—and that she frequently declared her intention to be, that " the *longer* Elizabeth Martin lived *in* her service, the better it should be for her"—lastly—that the codicils propounded, shortly after the same were written, respectively, were lodged by the deceased, with a

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~  
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duplicate part of her will, in the hands of her bankers, Messrs. Drummond's, where they remained till the time of her death—and *that* the deceased never declared it to be her intention to revoke them, or any of them, nor mentioned them, either directly or indirectly, at the time of executing the codicil, dated the 30th of December, 1823.

#### JUDGMENT.

Sir JOHN NICHOLL.

Mrs. Jane Greenough, the testatrix in this cause, died on the 14th of February last, 1824—she was a very old lady, and had been quite blind for several years—she lived with her nephew—they kept house together. She had been attended for several years by Henry Martin and Elizabeth, his wife: the husband had been her butler twenty-two years; the wife, her own *personal* attendant twenty-eight years.

In March, 1821, she made her will:—it was prepared in a full and formal manner by her solicitor, and executed in duplicate; one part of which was deposited with her solicitor, the other part with Messrs. Drummond's her bankers. By this will she left Martin and his wife, each, a legacy of 300*l.*, and she further bequeathed to Mrs. Martin an annuity of 50*l.* for life. In the month of May following, the deceased, with her own hand, wrote (or rather scrawled, for it is scarcely legible on account of the deceased's blindness) a codicil, giving to Martin and his wife, each, 200*l.* "over what left by my will." In January 1822, she wrote a similar paper, giving them 400*l.* each, "over what left by my will." In December, 1822, she wrote another similar paper, giving each of them 500*l.*:—but in this last paper there is no mention of her will.

These three papers, she sent to her bankers.—In December, 1823, she sent for her solicitor, desiring him to bring her will with him, as she wished to make a new one—he accordingly attended her, and took down her instructions in respect to the alterations which she wished to make *by* her new will. Among other instructions, she directed legacies of 1000*l.* each to Mr. and Mrs. Martin, and 15*l.* to each of them for mourning.

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The solicitor, finding the alterations to be but few, suggested, that they might conveniently be made by a codicil; to which she assented. The next day the solicitor brought the codicil for execution.

The will and the codicil were then read over to, and the latter executed by, the deceased. In the conclusion of the codicil she confirms the will, except so far as altered by the codicil. Now, the question is, whether the will and this *last* codicil are *alone* to be proved; or whether the three intermediate codicils *also* composed a part of the deceased's testamentary dispositions.

In a Court of *Construction*, where the *factum* of the instrument has been *previously* established in the Court of *Probate*, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate, the inquiry is not so limited: for the intentions of the deceased as to what instruments shall operate as, and compose, his or her will, are to be *there* collected from all the circumstances of the case taken together.

In the present case, it seems admitted that the *second* of these codicils, giving 400*l.* to each of the

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Martins, "over what was left by the will," would, even in a Court of Construction, be held as a substitution for, and not as an addition to, the bequest by the former codicil of 200*l.* each. But when the Court looks at the regular progress of these instruments, it can have very little doubt as to what were the real intentions of the testatrix in respect of *all* these codicils. After a very long service, when she makes her will, she estimates the proper recompence to each of them at 300*l.*: she soon after adds 200*l.*, making this 500*l.*: she then, after sometime, substitutes 400*l.* for the 200*l.* making the whole, 700*l.*: near a twelve-month afterwards she writes a paper, giving each of them 500*l.* This again was probably a *substitution* for the preceding codicil, as it would make the whole benefit to each 800*l.*, and the deceased, under her infirmity of blindness, and sending each of these papers *as* they were written, *severally*, to her bankers, might, very probably, not be exact in the formality of her proceedings, or aware of the legal construction which these several instruments might be exposed to. But when she sent to her solicitor to bring the duplicate of her will, which was in his possession, to her; and gave him instructions as for an entire new will; and in, and by that new will, intended to make the benefit to Martin and his wife, 1000*l.* each; I cannot bring my mind to doubt that, upon this intended *new* will being, at the suggestion of her solicitor, converted into a codicil, the former will, and this codicil, were clearly intended to convey the *whole* benefit which she meant to give to Mr. and Mrs. Martin; and that she had no intention whatever that these *intermediate* papers, written by herself, and



deposited at her bankers, should have any operation—the more especially as, by this codicil, now regularly executed, she confirms her *will*, except as thereby altered, but takes no notice of the three *codicils* now propounded. I am therefore of opinion that they do not compose a part of the deceased's will, and I must pronounce against their validity.

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### LONDON v NETTLESHIP and ARMITAGE.

By-day.

### JUDGMENT.

Sir JOHN NICHOLL.

Henry Landon, a liquor merchant, died on the 31st of July, 1821, leaving a widow and five children. The will, which is in contest in this cause, bears date the preceding day; by this will, he gives all his property to his wife and children, equally: except his real property, which he gives to his eldest son; and he appoints Mr. Nettleship and Mr. Armitage his executors, but without any benefit. He had no real property in possession: his personal estate is insolvent.

Probate of this will was taken by the executors soon after the testator's death; and they administered the effects for about eleven months:—the probate is *then* called in by the widow; and the executors are put upon proof of the will. What just motive could exist for taking such a step in respect to this *insolvent estate*, it is difficult to assign. The executors, however, have propounded the will; and in support of the *factum*, they have examined the drawer of it, the three attesting witnesses, and the apothecary who attended the deceased.

A probate called in at the suit of the widow; and the executors put on proof, *per testes* of the will, alleged by the widow to be invalid on account of the testator's incapacity. The will pronounced for; with costs against the widow, from the time of giving in her allegation; though against the evidence of two, of the three attesting witnesses.

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The drawer of the will mentions a circumstance, at the outset, rather of a startling kind; namely, that he was not allowed to go up stairs to the testator to receive the instructions, but, that the instructions were brought down to him through the intervention of Armitage, one of the executors. The witness explains, however, the reason, namely, that he entertained certain religious opinions, and occasionally preached; and that the deceased, being fearful that he, the witness, might think it right to urge his own opinions, declined a personal interview, as unwilling, at that time, to be disturbed upon such a subject. Another witness, Brown, was present, and heard the deceased give the instructions. Besides, the executor who conveyed the instructions to the drawer of the will, has no benefit whatever under the will—nay, he was not even intended to be an executor: for the deceased, having finished the dispositive part of the instructions, proposed to Brown to be one of the executors with Nettleship; and, it is only upon Brown's declining, that he requests Armitage to be an executor, to which Armitage assents, and is thereupon appointed. Nettleship was not present at any part of the transaction. But further—the widow, who perfectly well knew the condition of the testator, was actually a party to the whole transaction, though the will was to her prejudice, she not taking her distributive share, nor being even an executrix.

Brown is one of the attesting witnesses—and although he states that his memory is defective from ill health, yet he appears to give a fair and cautious account of what passed—and if he is credited, he fully proves capacity and volition. But the two

women who have attested the instrument, describe the deceased as in a state of total insensibility. They are deposing, however, against their own act, and against their own conduct at the time; and what is more, against the whole conduct of the very party who produces them as witnesses, the widow herself. The deceased's *cellar-man*, also, who came into the room just after the execution, joins the two women in representing the deceased to have been then in a state of incapacity—but on an interrogatory, he says, that he “always represented the deceased to two persons, Nettleship and Page, to have been in an insensible state when he saw him.” Now, these two persons, Nettleship (not the executor) and Page, who, on the next day, and for four months afterwards, were in constant communication with this cellar-man, being generally employed in the same warehouse, positively depose, that he never to them represented the deceased as being in a state of insensibility, or intimated any thing of the kind—his credit is therefore materially shaken.

The medical attendant, Mr. Warner, left the deceased soon after twelve o'clock in the day on which the will was made; and he deposes, that although he thought his recovery hopeless, yet his capacity was good at that time.

Mr. Warner's conduct at the time was consistent with the opinion he has now given—for, on going away he recommended, that if the deceased had not settled his affairs already, he had better make his will. This circumstance connects itself with what is stated by the witness, Joseph Armitage, who says, “that the widow told him the doctor had recom-

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mended the deceased's making his will, but that she did not think him so bad as the doctor did." Here then is the widow's own declaration at the time, confirming, indeed, her entire conduct, that the testator *was* in a sufficient state of testamentary capacity.

The whole subsequent conduct of the widow, and of all other parties, tends to confirm the validity of the will. Immediately on the death, the executors act in that character. Nettleship, who was not present at the making of the will, as well as Armitage, who was present, join in all acts. They conduct the funeral. They buy mourning for the family. They take probate of the will. They carry on the business. They renew the licence. They pay the rent. They meet the creditors.

At the meeting of the creditors, it was ascertained that the estate was greatly insolvent:—it was agreed to allow the widow three guineas and a-half a week for two months, and to give her the preference of taking the stock in trade, in case she could find friends to assist her. Three meetings of the creditors are held; when, at length, some dispute arising, either between the creditors, or on account of the widow's weekly allowance being discontinued, the widow is put upon calling in question the validity of the will, and compelling the executors to the proof of it by the present suit. I am of opinion that they have proved it, and that they have been vexatiously harassed, to their own injury, and to the injury of the other creditors of this insolvent estate. The widow in this suit has set up the incapacity of the testator, against the whole tenor of her own conduct, by which conduct she was, *in effect*, an attesting witness to this will.

It is therefore the duty of the Court not only to pronounce for the validity of the will, but to condemn the widow in costs from the time of giving in her allegation.

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CONSISTORY COURT OF LONDON.

MOLONY v. MOLONY.

(On the Admission of an Allegation.)

By-Day.

**T**HIS was a cause of restitution of conjugal rights, promoted by "Edmund Molony, esq. of Woodlands, in the county of Dublin, in Ireland, but now at Downing Street, in the county of Middlesex," (so described in the citation) against Jane Molony, of the parish of St. Mary-le-bone, in the county of Middlesex, his lawful wife.

An allegation responsive to the libel in a suit for restitution of conjugal rights, admitted to proof—although the facts pleaded amounted to a charge of, neither cruelty, nor adultery, against the party by whom a sentence of restitution was prayed.

The libel pleaded the marriage of the said Edmund Molony to Jane Molony, then Jane Jackson, widow, at Dunmore, in the county of Galway, in Ireland, on the 18th of March, 1817, and their cohabitation at Woodlands, till July, 1819; and, subsequently, in London, until the month of November, 1820; when it was pleaded, *that* "the said Edmund Molony was obliged, by important and necessary business, to return to Ireland; but that the said Jane Molony *declined* to accompany him: upon which he proceeded thither alone, and left her residing in his house, No. 17, in Crawford Street, Portman Square"—*that* the said Edmund Molony "was detained by his said business for a considerable time in Ireland;" and *that* "some-

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time in or about the months of May or June, 1821, the said Jane Molony quitted his said house in Crawford Street; and, from that time, concealed the place of her residence from the said Edmund Molony"—*that* in the spring of 1823, the said Edmund Molony, by means of his friends, "discovered the residence of the said Jane Molony," and came to London in the month of May in that year; and *that*, since discovering the residence of his said wife, the said Edmund Molony had, many times, by himself and his friends, required and intreated the said Jane Molony to live and cohabit with him; with which request and intreaty she, the said Jane Molony, had refused, and still refused, to comply, without any *just* cause. And the libel concluded, by praying, *that* "the said Jane Molony might be compelled by the sentence of the Court, to live and cohabit with the said Edmund Molony, to treat him with matrimonial affection; and to render him conjugal rights."

To this it was pleaded, *responsively*, on the part of the wife, in substance, as follows (a).

1. *That* at the time of the marriage of the parties as pleaded in the libel, Jane Molony, then Jane Jackson, widow, was entitled, under the will of her late husband, to an annuity of 800*l.* for life; and was possessed of jewels and other articles of personal property, valued at between 4000 and 5000*l.*: and *that*,

(a) This, it should be stated, however, is the substance of the allegation, *as reformed* under the direction of the Court—a reform effected by striking out some parts of the allegation, in its original state, objected to, as *irrelevant*, and so deemed by the Court; and by introducing the substantive averment in the 6th article, as to the plaintiff's usual place of abode, and fixed permanent domicile, being in Ireland *only*.

in virtue of her marriage settlement, this annuity of 800*l.* was secured to the wife for her own sole and separate use ; and the husband became entitled to her other property, of what nature soever.

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2. 3. *That*, from and after the marriage of the parties, they cohabited at Woodlands for upwards of two years, and until the month of June, 1819 ; when, Mrs. Molony having become nearly blind, in consequence of cataracts that had formed in her eyes, came to London, accompanied by her husband, to consult Mr. Alexander. *That*, on Mr. and Mrs. Molony's arrival in London, they took up their residence at a furnished house in Crawford Street ; where they also cohabited, until Mr. Molony's departure for Ireland, in November, 1821. *That* Mrs. Molony did *not*, on that occasion, decline or refuse to *accompany* her said husband, as pleaded in the libel : but *that* Mr. Molony, without apprizing his wife either then, or previously, of any such intention, left his house in Crawford Street, on the evening of the 19th of November in that year, and immediately proceeded to Ireland ; where he continued till May or June, 1820.

4. *That* Mrs. Molony neither quitted the house in Crawford Street, *voluntarily* ; nor concealed from Mr. Molony her subsequent places of abode, as pleaded in the libel—on the contrary, that she continued in Crawford Street till the month of June, 1821, when she was compelled to quit it in consequence of an execution put into the house by the landlord for rent in arrear ; under which execution, her whole property, except her wearing apparel, was seized and removed—*that* payment of the wife's separate income had been stopt, in this interval, in consequence of proceedings

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[a bill filed, and injunctions had,] instituted by the husband, in Chancery, against the wife and her trustees, towards the close of the year 1820—that on so quitting Crawford Street, Mrs. Molony removed to lodgings, first in George Street, and afterwards, viz. in August, 1822, in Charles Street, Manchester Square—and that Mr. Molony was acquainted, from the first, with such his wife's changes, and places, of residence.

5. *That* from November, 1820, Mr. Molony neither saw, nor communicated with, (nor in any manner contributed to the maintenance and support of) his said wife, till the month of June, 1823; when, being compelled to come to this country in order to give evidence in a suit then depending in the House of Lords, he did, upon arriving in London, call upon his said wife, in Charles Street.

6. *That* the usual place of abode of the said Edmund Molony was, and had long been, at Woodlands in Ireland: and that he, the said Edmund Molony, had not any fixed place of residence in this country.

7. *That* the said Jane Molony, from 1819, down to the present time, had been in very delicate health; and had been confined to her house, and to her room principally, from August, 1822—and that the said Jane Molony was, in the opinion of her medical attendants, incapable of removing to Ireland, or undertaking any considerable journey, without imminent danger to her health.

*The ADMISSION of this allegation was OPPOSED* by counsel, as not setting up any case which, however proved, would justify the Court, in declining to pronounce the sentence prayed by the husband, on proof, in substance, of his libel. They relied, of course, on the



commonly received maxim, departed from, as they maintained, in no single instance; that "facts pleadable in bar to a suit for, restitution are such only, as, upon proof, will entitle the party who pleads them to a sentence of *separation*, such sentence being prayed" (a). Nor could it be inferred, as they contended, either from the description of the husband in the citation, as from his *now* alleged sole domicil in *Ireland*, that it was the object of this suit to compel his wife to return to, and cohabit with him in, that country. But,

The Court

Over-ruled these objections—as not choosing, at *present*, to decide that the facts pleaded were wholly irrelevant—especially, the wife's state of health; and the husband's sole domicil in Ireland, *as pleaded*. Consequently, it admitted the wife's allegation to proof—but without pledging itself to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed, on behalf of the husband, in the libel, at the final hearing of the cause.

(a) Vide the case of *Barlee v. Barlee*, *ante*, vol. i. p. 305.

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BAIN v. BAIN.

By-Day.

IN this, which was a suit instituted by the husband against the wife for a separation *à mensâ et thoro*, by reason of adultery, the Court, upon this day, allotted alimony to the wife, *pendente lite*, at the rate of 300*l.* per annum. It was then prayed, on behalf of the wife, that the Court would direct it to be computed from the *issue*, and not from the *return*, of the cita-

Alimony *pendente lite*, is to be computed from the *return* only, and not from the *issue*, of the citation, even though considerably prior to the return—unless, possibly, under special circumstances.

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tion, an interval of between three and four months (a): otherwise, it was said, the alimony, *pendente lite*, for the first year, is in effect allotted, at the rate of 200*l.* and not that of 300*l.* per annum, the proportional allotment, as with reference to the husband's faculties. But,

The Court,

Saw nothing *special* in the case to induce it to depart from its usual practice of allotting alimony from the *return* only of the citation; and decreed accordingly.

(a) The citation was *served* on the 26th of July, [1823] but, owing to there being no intermediate Court day, it would not be *returned* till after the long vacation, in November.

Same day.

SMYTH v. SMYTH.

It is incompetent to the Court, under any circumstances, to make a *formal* allotment to the wife of any sum, in the nature even, or as on account, of alimony; until a *fact* of marriage, at least, is either proved *against*, or admitted by, the husband.

**T**HIS also was a cause similar to that of *Bain v. Bain*; instituted, however, by the wife against the husband.

The *libel* on this day was admitted *as reformed*; and the proctor for the wife now prayed that the Court would allot a sum to the wife, as on account, or in the nature, of alimony—this being the Court day immediately preceding a long vacation. But,

The Court

Said, that it was incompetent to it, *in point of form*, to make any allotment to the wife, of the nature prayed—there not only being no *constat* of the husband's faculties; but a marriage, *de facto* even, though pleaded against, being neither proved, nor confessed by

the husband. It recommended, however, that, in effect, the wife should be alimanted proportionably to the husband's means—during the long vacation, intimating, that it should take this into the account when, in the progress of the suit, alimony *pendente lite*, came to be *regularly* allotted, if its recommendation were not complied with.

1284.  
*Trinity*  
*Term.*  
SMYTH  
v.  
SMYTH.

STEEVEN and HOLLAH v. The RECTOR, PARISHIONERS, and INHABITANTS of the Parish of ST. MARTIN ORGARS, in special, and all others in general.

(*On Motion.*)

THE parish church of St. Martin Orgars (*a*), together with that of the adjoining parish, St. Clement, Eastcheap, was destroyed by the fire of London in 1666. By the act of 22 Car. II. c. 11. for rebuilding the several churches, and the union of the respective parishes therein mentioned, it was enacted (s. 63.) *that* the parishes of St. Clement Eastcheap, and St. Martin Orgars, should be united into one parish; and *that* the church thentofore belonging to St. Clement Eastcheap, should be the parish church of the said parishes so united. And by sect. 66 of the same act, it was provided, *that* the scite of the church of

By-day.

An application for a faculty to take down a church (so styled), in effect, acceded to, by the Court; under the peculiar circumstances, verified on behalf of the applicants, of the building being in a state of dilapidation; and there being no person, or persons, compellable by law to restore and uphold it.

(*a*) This epithet "Orgars" is derived by Newcourt, from Odgarus, or Ordgarus, the probable founder of the church; who gave it to the Dean and Chapter of St. Paul's, still its patrons, about the year 1185. See Rep. Eccl. vol. i. p. 416.

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St. Martin Orgars, and the church-yard belonging to the same, should be inclosed with brick or stone walls for a burial place for the said united parishes, and should not be used or employed for any other purpose whatever—a general provision of the act extending to the several other demolished churches, and their church-yards, similarly circumstanced, under the act, with those of St. Martin Orgars.

It appears, however, that the rector and churchwardens of the said parish, by lease, bearing date the 3d of February, 1699, demised or granted the piece of ground whereon the church of St. Martin Orgars had formerly stood, to certain persons (as trustees for certain French refugees of the protestant religion who had previously assembled, first, at a house in Jewin Street, and afterwards, at a house on College Hill, in virtue of letters patent under the great seal of England (*a*), bearing date the 16th of June, in the second year of King James the Second) in order to erect a church for the performance of divine service, and the celebration of the holy sacraments, or other rites of the church, in the French language, but according to the liturgy of the church of England—saving to the rector and churchwardens of the said parish their right of burial therein, and all fees in respect thereof. This lease, which was for fifty years, with powers of renewal as covenanted in the same, and

(*a*) Granted originally, to Peter Alix, clerk, and such other French refugees of the protestant religion," (very numerous, and becoming daily more so, at that time, in consequence of the *then* recent revocation of the edict of Nantz) "as should join themselves with him."

at a reserved rent of 35*l.* per annum, was confirmed by a private act, 11 & 12 Will. III. No. 54.

A church was, accordingly, built, partly, it should seem, upon the old foundation: and continued from that time, in the occupation of French protestants, descendants, probably, of those for whose use it was originally erected, at first by renewal of their lease, and, latterly, as yearly tenants, till Christmas, 1823, when possession of the same was delivered up to the churchwardens of St. Martin Orgars; who, in consequence of the dilapidated state of the building, were authorized by order of vestry to take down the same, preserving the vaults beneath so as still to form part of the burial place of the inhabitants of the said parish.

Under these circumstances, a decree had issued, at the promotion of the said churchwardens, calling upon the rector, parishioners, and inhabitants, of the parish of St. Martin Orgars, in special, and all others in general, having or pretending to have any right, title, or interest in the premises, to appear and shew cause, why a *licence*, or FACULTY, should not be granted to the churchwardens for the purpose aforesaid with the usual intimation: which citation having been duly published in the church of St. Clement Eastcheap, and returned without any appearance given, the Judge was now moved to decree a faculty pursuant to the said intimation.

*Court.*—[Sir CHRISTOPHER ROBINSON.]

The Court is disposed, on the whole, to accede to the present application, unwilling as it is, upon general considerations, to sanction the utter demolition of any building, which has something, at least, of the cha-

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ORGANS.

racter of a national church (a). At the same time it could wish this matter to stand over, in order to afford the parish time to consider, whether this building, which is a spacious building, and not, as the Court has ascertained by its own inspection, in a state of visible decadency, might not be repaired, and made subservient in some way (for instance, as a national school) to the church establishment: its appropriation in this sort the Court might feel itself justified in sanctioning, under, at least, the *implied*, authority of the private act of King William the Third. In the event of the building itself being wholly demolished, the scite can only be used for a burial place; and can be devoted to no other use whatever, under the express provisions of the act of Car. II. sect. 66.

Let this matter stand over till next term; in which interval an accurate survey may be made of the state of the building; and the parish may have time to consider, or to reconsider, the propriety of applying it, and the capacity of the building to be applied, in some such manner as that which I have suggested. But if they think it ultimately expedient, as there are great dilapidations, though principally, it seems to me, in the

(a) The Court observed, that the act of King William had scarcely impressed that character *permanently* upon it, although, in confirming the lease, &c. it provided, "that before the building to be erected should be made use of for purposes of divine worship, it should be decently fitted and accommodated; and so furnished and adorned as the Archbishop of Canterbury and the Bishop of London for the time being, or one of them, should direct and appoint." *Quære*, however, such *being* the character of the building, the NECESSITY for any faculty to justify the parishioners in taking it down?

roof, and which nobody is compellable to repair, I think that they are entitled to have the scite of the old church restored to the state contemplated by the fire act; under which impression, I shall be disposed to accede to their *renewed* application for a *faculty* to take this building down, unconditionally. I understand that the Dean and Chapter of St. Paul's the Patrons of the living have been consulted; and have intimated that it is not their intention to offer any objection.

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HOLLAN  
v.

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ORGARS.

IN THE HIGH COURT OF DELEGATES.

BRISCO v. BRISCO.

1st June.

The Judges who sat upon this question were—

Mr. Justice BURROUGH,

Mr. Baron GARROW (*a*),

Dr. DAUBENY,

Dr. GOSTLING,

Dr. J. ADDAMS.

**THIS** cause commenced in the Consistory Court of London; and was brought by Dame Sarah Brisco against her husband Sir Wastel Brisco, Baronet, for a divorce, by reason of cruelty and adultery.

Adultery committed by either party (husband or wife), at any time BEFORE sentence, will bar a sentence of separation, at the suit of the other party; or will compel the Court to dismiss both parties, adultery being mutually, or reciprocally, charged in the cause: and Courts must permit either of such parties to plead adultery against the other, in any stage of such a cause, whether before or after publication, and how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to the proponent's knowledge.

(*a*) Mr. Justice Best, who was also named in the commission, had taken his seat as Lord Chief Justice of the Court of Common Pleas, in the interval between this, and the last, sitting of the Court; and was not present.

Adultery being mutually, or reciprocally, charged in the cause: and Courts must permit either of such parties to plead adultery against the other, in any stage of such a cause, whether before or after publication, and how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to the proponent's knowledge.

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Term.

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v.  
BRISCO.

The following is an abstract of such of the proceedings in the cause, as require to be stated with reference to the question before the Court.

The citation was returned on the first session of Hilary Term, 1814; and a libel, brought in in the same term, was admitted to proof, without opposition, on the fourth session of Easter Term in that year.

In the month of April, 1816, an allegation, responsive to the libel, was brought in on the part of Sir Wastel Brisco; and was admitted, as reformed, having been opposed in its original state, on the first session of the following Trinity Term.

In the month of May, 1816, a rejoinder, or second plea, was filed on behalf of Lady Brisco, and was admitted to proof, without opposition, as the libel had been, on the first session of Trinity Term in that year.

Publication of the evidence taken upon these several pleas passed in the Consistory Court of London on the 20th of May, 1817. And on the first session of Hilary Term, 1818, both proctors asserted allegations, *exceptive* to the testimony of witnesses.

Such exceptive allegation on the part of Sir Wastel Brisco was argued on the third session, and was admitted on the fourth session, of that same Hilary Term. The admissibility of an exceptive allegation offered on behalf of Lady Brisco, was debated on the second session of the following (Easter,) Term; when the Judge of the Consistory Court, directing certain articles of that allegation to be reformed, and, **ESPECIALLY**, refusing to admit to proof, or wholly rejecting, the 5th, the 8th, the 9th, and the 12th articles of



the allegation, the proctor for Lady Brisco appealed to the Court of Arches.

In the Court of Arches, the Judge was pleased, on the fourth session of Easter Term, 1819, to allot the same sum to Lady Brisco for alimony *pendente lite*, being the sum of 200*l.* per annum, as had been allotted to her, by the Judge of the Court below. But having, at the same time, ordered or decreed, that such alimony should be computed from the date of the sentence appealed from, and not merely from the return of the inhibition, as prayed by Sir Wastel Brisco, an appeal on the part of Sir Wastel Brisco was lodged, from that order or decree, to the High Court of Delegates.

On the 15th of February, 1820, the cause on the appeal as to this grievance came before the High Court of Delegates (*the whole commission*); when the Judges pronounced *against* the appeal, and affirmed the order appealed from: but (at the prayer of both proctors) they retained the principal cause (*a*); and therein decreed a monition against Sir Wastel Brisco for the payment of certain costs, and the alimony *then* due. And on the second session of Easter Term, 1820, Sir Wastel Brisco was pronounced in contempt, and directed to be signified, by the Court of Condelegates, for not having obeyed that monition, duly and personally served upon him.

On the third session of Michaelmas Term, 1822 (*b*), Sir Wastel Brisco was absolved from his contumacy by the Court of Condelegates, on payment of the

(*a*) 3 Phill. 106.

(*b*) Sir Wastel Brisco was understood to have been abroad during the greater part of this interval, to avoid an attachment under the *significavit*.

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costs and alimony, for non-payment of which he had been pronounced in contempt, and taking the usual oath; upon which, the cause, as to the appeal from the rejection, &c. of certain parts of Lady Brisco's exceptive allegation by the Consistory Court of London, was proceeded in, and the same came on for hearing, before the *whole commission*, on the 19th of June, 1823; when the Judges admitted the 8th, 9th, and 12th articles of that allegation, which had been rejected by the Judge of the Consistory Court, as also the 5th article, with a slight reformation.

On the by-day after Michaelmas Term, 1823, the Court of Condelegates decreed publication of the evidence upon these *exceptive* allegations; when, on the same day, the proctor for Lady Brisco asserted, and prayed leave to bring in a *further allegation*, on the part of her Ladyship, in the *principal cause*. The Court of Condelegates declining, as upon its own responsibility, to receive that further allegation in this late stage of the proceedings, the proctor then prayed to be heard, as to this, upon his petition (a), before the *whole commission*; and that prayer was referred by the Court of Condelegates to, and now came before, the *whole commission*, as at the final hearing of the cause; when the proctors of the several parties concurred in praying a sentence of separation—the proctor for Lady Brisco, by reason of the cruelty and adultery of Sir Wastel Brisco—the proctor for Sir Wastel Brisco by reason of adultery committed by Lady Brisco—the proctor for Lady Brisco however, also praying, that the Judges would first rescind

(a) No petition, in fact, was entered into, the question being determined, as upon a mere motion, at the (intended) hearing of the cause. See *post*, pp. 263—266.

the conclusion of the cause in order to *receive* the allegation aforesaid, and admit the same to proof, before proceeding to the hearing of the principal cause; in the event only of which prayer being rejected, *he* prayed it to pronounce to the effect before stated.

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*The allegation so brought in, in the principal cause on the part of Lady Brisco, in substance pleaded, the commission of adultery by Sir Wastel Brisco, with a person named Sarah Stow, a servant in his family, with whom, it pleaded, that he went to reside in furnished lodgings at a house situate in Upper Norton Street, in the parish of Mary-le-bone, in the month of February, 1821: that they continued to live and reside there, passing as husband and wife, till the latter end of March, in the same year: and that, after leaving the said lodgings, they, the said Sir Wastel Brisco, and Sarah Stow, went to Crofton Hall, the seat of Sir Wastel Brisco in Cumberland, where an adulterous intercourse (alleged still to subsist) was kept up, and carried on, between the said parties; in consequence of which she, the said Sarah Stow, had been delivered of two children, the one in September, 1822, and the other in September, 1823, begotten upon her body, by the said Sir Wastel Brisco. This allegation was accompanied with an affidavit, made by Lady Brisco, to the effect, that the several facts and circumstances pleaded in the allegation did not come to her Ladyship's knowledge till the month of August, 1823, long after the 20th of May, 1817, when publication of the evidence taken in the cause passed in the Consistory Court of London.*

*In opposition to the RECEPTION of this further allegation in the principal cause, on the part of Lady Brisco, (the preliminary question), it was not attempted to be*

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maintained, by the counsel for Sir Wastel Brisco, that the allegation ought not to be received upon *general* considerations, and viewed as with reference to *general* principles: but, they contended, that this being a suit unique, and *sui generis* as it were, with respect to the length of time consumed, and the number of witnesses examined, in it, the Court, in its discretion, ought *not* to rescind the conclusion of the cause in this last stage of it, and by so doing, permit her Ladyship, in effect, to set up a new case, nearly seven years after publication of the principal evidence taken in the cause, and founded upon delinquency of the husband, admitting it to be, even *laid in the allegation* to have occurred, more than seven years after the return of the citation.

On the part of *Lady Brisco*, it was contended, on the other hand, that these circumstances were not of a nature at all to affect the general principle (*a*) upon which the allegation was, confessedly, receivable; or to prevent its application to the individual case; *that* the

(*a*) *Quando ANTE Divortii Sententiam contingit innocentis lapsus, constat inter omnes doctores teneri hunc ad conjugem dimissam—immo POST sententiam;*” he afterwards says “*satis probabiliter docent multi.*” [Lib. x. Disp. x. No. 24.] And so, as to this last particular (for the first appears to admit of no question) Ayliffe asserts [Parer. 226.] that “if the husband himself shall, AFTER such divorce (namely, for the wife’s adultery) commit fornication, the marriage shall be restored, on the score of his lewdness, and the husband, for a *punishment*, shall be obliged to receive his wife again.” By this however it is not to be understood, that the “*lapsus innocentis POST divortium,*” places the other party in a condition to charge, or object, that delinquency, in the first instance, in order to make it the foundation of a prayer for “*restitution of conjugal rights.*” This is to be inferred from the terms made use of by Ayliffe, “for a *punishment,*” &c. and from the

husband's delinquency, at *any* time prior to sentence, would bar his claim to a legal separation on account

following passage in Sanchez, upon whom Ayliffe *probably* founds himself in this dictum; although neither that of Sanchez, nor any other authority is, *expressly*, vouched for it.

The fourth opinion upon this subject, says Sanchez—" *Quarta sententia (cui adhæreo tanquam probabiliori) asserit nullam actionem acquiri conjugi adultero ut repetat innocentem, qui, POST divortii sententiam adulteratus est; atque ITA ea delicta minimè compensari: integrum tamen esse iudici ut eos concitiet, ex officio suo illos cogens, quo fornicationis periculo consulatur. Prob. prior pars, nimirum non dari actionem: 1mo, quia, semel bene diffinitum minimè retrahendum est: Secundò, quia servitus, semel amissa, non renascitur: Servitus autem innocentis conjugis amittitur, lata sententia divortii: Tertiò, quia licet adulterii exceptio per simile adulterium extinguatur; at exceptio rei judicatæ, quæ obstat priori conjugii repelenti, minimè aboletur per crimen POST sententiam admissum: Quartò, quia divortii sententia absolvit innocentem a debito conjugalis societatis; dissolviturque contractum matrimonii quoad jus thori, et habitationis, manente vinculo: quare innocens, postea fornicans, reus erit adulterii in ordine ad Deum ob vinculum matrimonii perseperans; non tamen peccabit adversus conjugem dimissum, nec illi injuriam inferet, utpote qui jure in illius corpus destitutus erat per sententiam, &c.*" This, he says, however, is only to be understood " *quando sententia illa divortii transit in rem judicatam, eo quod decennium appellationi concessum sit transactum; vel si fuerint tres sententiæ latæ. Nam si id non ita se habeat, perinde reputandum est ac si sententia non præcessisset adulterium posterius: quia virtus sententiæ est suspensa.*"

" *Debet autem,*" he goes on to observe, "*judex ex officio, licet alter conjux minime petat, hos conjuges reconciliare. Quia Prælatus, ut pastor animarum, tenetur periculis incontinentiæ occurrere. Hoc autem intelligendum non est regulariter: sed solum quando manifestum est, periculum conjugum, et aliorum scandalum. Sic Sotus. Bart. à Ledesma, et alii. Imo Sotus et Bart. à Ledesma recte dicunt minimè teneri judicem uti medio tam rigido, nisi conjux ille prius innocens perditissime viveret, magnum suis adulteriis scandalum generans. At posse compellere, in penam, ob ejus conjugis scandalum.*" See Sanchez, lib. x. Disp. x. No. 30, 31. per tot.

This note has been extended, in consequence of a doubt ex-

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of his wife's adultery; as also, would entitle the *wife* (adultery, as in this instance, being mutually or reciprocally charged) to a sentence of separation on account of the *husband's* adultery, in the event of the charge against *her* not being proved. Consequently, they insisted, that facts of the nature of those now pleaded, were strictly pleadable in such a cause at *any* time prior to a sentence; being also, as sworn in this instance, *noviter perventa*, or facts that had *recently* come to the proponent's knowledge: so that the allegation before the Court, at however late a period of the cause offered, ought to be *received*.

THE COURT, on deliberation, inclining to this view of the subject; and, that this was not a case in which it was at liberty to exercise any such discretion, with respect to rescinding the conclusion of the cause, &c. as that with which Sir Wastel Brisco's counsel had *sought* to invest it, finally pronounced for *receiving* the allegation; and it was afterwards, on the same day, without further opposition from Sir Wastel Brisco's counsel, *admitted to proof*.

pressed in a late work (suggested, in part, by something *reported* to have recently fallen from a learned judge) whether the doctrine of "compensation" might not possibly apply to the extent of entitling either party, a wife or a husband, divorced for adultery from the other party, to be restored to his, or her, conjugal rights; on proof of similar delinquency in that other party, even though, itself, not *occurring* till AFTER such sentence of divorce. See Mr. Poynter's "Law of Marriage and Divorce" (p. 225, 2d ed. 1824); where the various points connected with those subjects are neatly arranged, and are stated, in the main, with great accuracy,

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## MICHAELMAS TERM.

ARCHES COURT OF CANTERBURY.

1st Session.

DURANT v. DURANT.

(On Petition.)

**THIS** was a cause of divorce, by reason of adultery, brought by the wife against the husband (a). The present question respected an application made to the Court, on the part of the husband, by act on petition, to *rescind* the *conclusion* of the cause: in order to receive an allegation not filed in due time, that is, *before* the cause was *concluded*, exceptive to the testimony of certain witnesses examined upon the wife's libel.

JUDGMENT.

Sir JOHN NICHOLL.

In deciding upon this petition, I must be understood to confine myself to the matter of the petition—for I have not thought it my duty, in order to this, to peruse and consider all the evidence, (the depositions of forty-four witnesses) (b) and all the pleadings, in the principal cause. The petition must stand upon its own statements—together, indeed, with what of the principal cause has been brought, officially, to the notice of the Court, in former stages of it.

When the Court is prayed to rescind the conclusion of a cause, in order to fresh matter being pleaded, it always requires to be satisfied, both that the party praying it is in no *laches*, and that the measure prayed is one essential to the ends of justice —It always further requires that some *special* ground be laid (as that of such fresh matter having *newly* come to the party's knowledge, or as the case may be) to *found* the prayer.

(a) See vol. 1, p. 114.

(b) Twenty-three on the Libel,—and twenty-one on the Allegation of Faculties.

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The proceedings have, throughout, I must say, the same general complexion. The cause, throughout, has an appearance of great and studied delay in one of the parties. It is a charge, brought by the wife against the husband, of adultery—which, whether well or ill founded, ought at once to have been fairly met. The suit, however, has existed nearly five years; during the last four, at least, of which it has been adversely contested, without any decision either as to the principal point, or even as to the matter of alimony: so that the wife has merely obtained, from time to time, and with difficulty, small pittances on account of alimony, instead of being in possession of stated alimony during this long interval, to which she was justly entitled. On the second session of Hilary Term, 1823, nearly two years ago, the Court *concluded* the principal cause, and assigned it for informations and sentence on the next Court day; rejecting an application, made by the husband's proctor, to allow further time to bring in an exceptive allegation to certain witnesses examined on the wife's libel—an application founded merely upon verbal statements made by the proctor, and unsupported by any affidavit. From this, an appeal was lodged, at once, to the Court of Delegates; who, in Trinity Term, 1823, affirmed the order of this Court, and remitted the cause—in which, however, when the Court was about to proceed, “according to the tenor of former acts” namely, to a hearing, it was again stopped by the present *petition*, praying, *that* it would rescind the conclusion of the cause, and allow time for giving in an exceptive allegation—a prayer which, as I have just said, it had once already rejected, when *moved* to grant it (at that time, to be sure, on verbal statements merely) by the defendant's proctor.



Applications of this nature, for obvious reasons, are *seldom* acceded to by the Court; though, undoubtedly, it is *competent* to the Court to accede to them. But in order to this it ought at least, I think, independent of any *special* ground laid, first to be satisfied, both that the measure prayed is one essential to the ends of justice; and that the necessity for praying it has resulted from no *laches* on his part in whose behalf it is prayed. In the absence of either, *à fortiori* of both, those requisites, the Court is bound to reject such a prayer, if for that reason, or for those reasons, only—especially in a case, the proceedings in which justify a suspicion, that the measure itself may be one, of several, contrivances, to protract and impede the decision of the principal cause.

The *special* ground laid, in addition to those general ones already suggested, for an application to rescind the conclusion of a cause in order to permit fresh matter to be pleaded, *ordinarily* is, that certain material facts are "*noviter perventa*," newly come, to the knowledge of the applicant. No such ground is laid in support of this prayer—on the contrary, the *special* ground is one of such a nature as to suggest serious doubts whether, under any circumstances, the Court would be justified in attaching any weight to it in support of such a prayer. No "*new facts*" are even alleged to have come to the knowledge of the defendant in this cause. He has endeavoured, however, both to relieve himself from any charge of *laches*, and to satisfy the Court that the measure prayed is one really essential to a due decision upon the merits of the cause—with what success I proceed to consider; in doing which, that *special* ground laid for sustaining the prayer of this petition, to

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 Of the evidence taken in this cause, publication actually passed on the fourth session of Michaelmas Term, 1822, the proctor for the husband declaring (all facts being *then* to be propounded) that he should give no allegation unless exceptive to the testimony of witnesses; upon which the cause stood "*on* admission of such exceptive allegation, if any, on the By-day; if not admitted, the cause to be concluded, and assigned for informations and sentence the next Court." From the By-day, that assignation was continued till the first session of the ensuing Term (a period of nearly seven weeks), the husband's proctor being, at the same time, assigned to deliver a copy of his exceptive allegation to the adverse proctor fourteen days before that first session; with a strong intimation from the Court, that, not complying *precisely* with the assignation, he must, at all events, be prepared satisfactorily to account for this, by an affidavit, or affidavits, to save the cause from being concluded. Under these assignations, neither an allegation being tendered, nor a single affidavit to account for its not being, even upon the first session of Hilary Term itself, the Court concluded the cause—the appeal from which decree, and the proceedings under that appeal, and subsequently, have already been stated; and the effect of which has *already* been to delay the hearing of this cause nearly two years. Are then the facts stated in this petition such, and so sustained, as to induce the Court to occasion still further delay, by rescinding the conclusion of the cause, at this late period, in order to admit an exceptive plea?

The principal, I might almost say the only, matter

set up, both to justify the husband on the score of *laches*, and also to lay any *special* foundation for the present application, is, that he was prevented from filing his allegation, at the time assigned him by the Court, through the illness of his *attorney*. The petition states, in substance, *that* immediately upon copies of the evidence being taken, the same were forwarded to Thomas Wood, the attorney of the husband, and who had attended the execution of the commission issued by this Court for the examination of witnesses on the libel, and allegation of faculties, at Penkridge in Staffordshire, as the proctor's substitute, with an *earnest* request, that instructions should *forthwith* be furnished for an exceptive plea, if any such was intended to be offered—this, in the beginning of December—but that early in that month, Mr. Wood was taken *ill*, and was confined to his house from that time, for the space of three months, (only once going out upon urgent business) by reason of which, he was prevented from *seeing* the husband on the subject of this exceptive plea—however, *that* he forwarded the evidence to the husband, with written advice on the subject, who returned the same with directions that the necessary steps should be taken to except to the testimony of five witnesses, examined on the libel—*that* the husband was then apprized, by Wood, of the nature of the evidence which would be required in support of such exceptive plea; who, thereupon, instituted enquiries as to the persons whom he supposed competent to give evidence in support of it—in the course of which, from the difficulty in discovering the abode of such persons, and the distance thereof from the husband's residence, so considerable an interval elapsed, that only on the

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17th of January, (three days before the first session of Hilary Term) the proctor received final instructions for an exceptive plea—and being then only, for the first time, informed of the illness of the said Thomas Wood, &c.; he was unable, on the first session of Hilary Term, either to comply with the assignation of the Court as to giving in the exceptive allegation, or to procure an affidavit, accounting for the delay.

Now here, in the first place, not to insist that this Court knows nothing of attornies; that the proctor is "*dominus litis*," and that he, and his principal, are alone responsible, both to the Court and the other party, I must observe, that the fact of Mr. Wood's illness, to any such extent as to account for the delay alleged to have been occasioned by that illness, is denied, and is, I think, substantially disproved on the part of the complainant. But supposing the fact to have been true—supposing that his assistance as an agent was, if not so necessary, so convenient, as hardly to be dispensed with; that he, Wood, was incapacitated by illness from affording that assistance, and that the services of no other agent could be substituted for, or accepted in lieu of, his, what is there to account for all this not being verified to the Court, at the proper time, by affidavit? The statement in the act on petition, may excuse the proctor in respect of *laches*, especially as it states him to have written, as early as the 6th of December, earnestly desiring instructions *forthwith* in the premises; notwithstanding which he hears nothing of the parties till the 17th of January. But this, which acquits the proctor of *laches*, fixes that imputation the more forcibly, either on the party, or on his sub-agent, for whose acts he is answerable, or on both—it

being incumbent, as I have said, for the party to have absolutely *cleared* himself from any such imputation, to justify the Court in acceding to him the indulgence now prayed. Hence I think that the excuse offered is neither true in fact, nor sufficient in kind, if it were true.

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And I must further observe, that even supposing the case now set up, the main ground for the indulgence now prayed, had been made in due time, and urged in a proper shape, that of a petition, sustained by affidavits, to the Court itself, to rescind the conclusion of the cause, in lieu of, and prior to, the *appeal*; it might have been a grave question how far the Court would have been justified, no disability in either the proctor or the party being alleged, in permitting the disability of a *third* party, of a solicitor, of whom the Court knows nothing, to operate the desired effect; or at all to weigh with it, in favour of that one party, to the prejudice of the other.

The Court might stop here without any impropriety: for, at least, the party who prays it, being in *laches*, has made out no title to the indulgence prayed, on that ground only. But let us see how far the measure prayed, upon this shewing, is one likely to be essential to the ends of justice in the cause: a consideration in which it will also further, incidentally, appear, whether the husband has a fair claim to any special indulgence of this description.

Now so far is the measure prayed from being one apparently essential to the ends of justice, on the face of this petition, that I think it extremely doubtful, how far any allegation, in exception to the testimony of the five witnesses proposed to be excepted to, would have been admissible, even prior to the conclusion of

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the cause. I am not saying that it might not have so been, if tendered in the proper stage of the cause. But I do say, that its claims to admission, even then, would have been so strictly investigated by the Court, and would have been required to be made out in so unexceptionable a manner, as to render this extremely questionable. Who are the five persons proposed to be excepted to? They are persons living in the defendant's own neighbourhood, and deposing to his own conduct; so that he must have known, *generally* at least, if not *very* specifically, the effect of their evidence, from the contents of the libel in proof of which they were examined. Add to this, it is not suggested that they have introduced any extra-articulate matter into their depositions; or that the husband had not *full* time and opportunity to cross examine them. Now it is difficult to conceive that an exceptive allegation to the testimony of such witnesses, under such circumstances, could have made good its claim to be admitted at any time. From the moment of their production, he must have known their general character—and from the contents of the libel, as I have said, the substance, at least, of their testimony. Yet neither is their general character excepted to—nor is the libel in such, or any, particulars, contradicted by plea; for the husband gave no plea whatever before publication. As then no rule is better known, or ought more strictly to be adhered to, than this; that a witness shall not be excepted to, as to facts spoken to in his deposition, provided the party against whom that witness appears might have contradicted those facts by plea prior to publication—it is difficult, I say, to conceive, for it is unnecessary to decide that point absolutely, that the husband could

have framed any allegation, in exception to the testimony of these witnesses, that the court would have admitted to proof in any stage of this cause. Be that however as it may, there is nothing, on the face of this petition, which is all that I can look to, to satisfy me, that the indulgence now prayed, is one at all likely to conduce essentially to the ends of justice in this cause; from which, as well as from thinking that *other* circumstance alleged in order to induce the Court to grant this indulgence, viz. the illness of the party's attorney, neither such in itself, nor so sustained, that it ought to have any weight with the Court, and from the *laches* of the party on whose behalf it is made, I hold myself bound to *reject* the prayer of the petition.

If, however, at the hearing, it shall appear that the cause entirely, or even mainly, depends upon the testimony of the five (out of twenty-three) witnesses on the libel, proposed to be excepted to, so that every thing, or even much, depends upon giving them *full* credit, (their credit being shaken, as by interrogatories, or otherwise) the Court, in its discretion, and in order to arrive at the real and substantial justice of the case, may, even then, rescind the conclusion of the cause, and permit evidence to be taken upon a plea of the description of that now proposed to be offered. But, on the statements made in this petition, the Court cannot hesitate in rejecting the prayer of it, and in proceeding to hear the cause. And, as it is the duty of both parties to be ready to proceed to the hearing, for so stands the assignation, I shall proceed to the hearing next Court day, at least at the prayer of the

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1824. wife, the complainant, whether this be convenient, or  
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Petition rejected.

(a) The principal cause, however, was not *finally* disposed of till the second session of Easter Term, 1825; when the judge held the libel to be proved, and pronounced the sentence of separation prayed by Mrs. Durant. From that sentence Mr. Durant has since appealed to the High Court of Delegates.

2d Session.

GREG v. GREG.

(On Protest.)

If an appearance under protest be given to an inhibition which discloses an appealable grievance, on the face of it, without, at the same time, so disclosing any peremption of the appellant's right to appeal therefrom, the court will, at least, overrule such protest, and direct an absolute appearance.

**THIS** was a suit by the husband for restitution of conjugal rights, appealed by the wife to this Court from that in which it originally depended, (the Consistory Court of London) on a grievance. The husband *appeared* to the usual inhibition of the Court, not absolutely, but under *protest*; and the validity of that protest was the point immediately at issue.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit for restitution of conjugal rights, brought by the husband against the wife, originally depending in the Consistory Court of London, and is appealed to this Court, by the wife. It is necessary

that I should briefly advert to the proceedings in the

*Note 1.* That praying a judge to rescind any order perempts an after appeal from that order. 2. That his refusing to accede to such prayer is not, itself, an appealable grievance—any more than is 3. His refusing to permit witnesses to be examined “on the day assigned to propound all facts”; even though such witnesses are actually in Court, and are sworn to be necessary witnesses.



Court below, in order to arrive at the merits of the present question; which arises out of an appearance given by the husband under *protest* to the inhibition issued by this Court.

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The citation was returned on the first session of Easter Term, 1819, but no appearance was given for the wife till the second session of Hilary Term, 1820. On the second session of Easter Term, 1820, a libel was given in by the husband, in common form. This produced a responsive allegation on the part of the wife; but not, again, till the third session of Trinity Term, 1821: nor was that allegation admitted, as finally reformed, till the first session of Easter Term, 1822. The husband's answers were brought in, in the October of that year; but no witnesses have been produced upon this allegation. A second plea, on the part of the husband, was brought in on the By-day after Hilary Term, and was admitted on the 12th of May, 1823. Upon this, as also upon the libel, witnesses have been examined; and, on the third session of the following Michaelmas Term, the husband prayed "publication, and all facts to be propounded next Court." Such have been the proceedings, as appears by the several *assignments*, in the Court below, in the *principal* cause; exclusive of that from which this appeal is prosecuted, of which presently—and I must say that they carry with them every appearance of studied delay in the wife, the party proceeded against in the original cause, and the appellant in this Court.

Collaterally with these proceedings in the principal cause, there were some other proceedings, also depending between the same parties, in the Court below, upon a matter incidental to, though partly independent

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of the first, which require to be stated. On the first session of Easter Term, 1821, the wife's proctor prayed to be heard, "on taxation of costs." The proctor for the husband prayed to be heard, on his petition, in objection to this; and, on the first session of Trinity Term following, alleged, that he had delivered his "*act*" to the wife's proctor, who was assigned to return the same the next Court. Instead, however, of *complying* with that assignation, *precisely*, or in any sense of the word, the "*act*" in question is not returned by the wife's proctor even upon the third session of Michaelmas Term, 1823, when the husband's proctor, as I have said, prayed "publication, and to propound all facts next Court." The proctor for the wife objects to this assignation; and, on the By-day after that Michaelmas Term (then, for the first time alleging that he has (*just*) returned the *act*, to the husband's proctor) prays, that the Court will rescind the assignation decreeing "publication and to propound all facts;" and that it will extend the term probatory, till the wife's costs are paid—whilst the proctor for the husband prays the Court to *conclude* the cause, and assign it "for informations and sentence." No order should seem to have been made upon this; the judge merely directing the whole matter to stand over *generally*. It is pretty obvious, I think, from the course of the above proceedings, that the wife had means of defending herself, *independent* of the husband; for she takes no step to enforce payment of her costs *by* the husband for above two years.

On the first session of Easter Term, 1824, the act of Court (that, I mean, as to the question of costs) is, at length, concluded, and affidavits on both sides are

brought in, in support of it. On the second session, the petition is *heard*, and the judge takes time to deliberate. On the third session, the wife's proctor tenders a further affidavit in support of his petition, which, however, the Court rejects, together with the petition (the wife's petition for her costs) itself; and, at the same time, at the husband's petition, concludes the cause, and assigns it for informations and sentence.

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I do not make out, very clearly, how the assignation stood upon this Court day, no process being before the Court. I rather apprehend it to have been a sort of compound assignation; "to propound all facts, AND, on petition of both proctors." But, however the assignation stood on that Court day, on the following Court day, viz. the fourth session of Easter Term, the cause is alleged to be, in due time and place, appealed, on the part of the wife—and the wife's proctor, at the petition of the proctor for the husband, (not alleging the supposed grievance *not* to be an appealable matter, or that, if an appealable matter, the appeal had been perempted, as by acquiescence, or otherwise, so that it is competent to the Court below to proceed to a sentence, notwithstanding the appeal, or any thing of *that* sort) at the petition, I say, of the proctor for the husband, is assigned to prosecute his appeal by the first session of the next Term. In spite of which, however, that proctor for the husband now appears, under protest, to the inhibition issued by this Court—submitting the incompetence of the wife to allege the appeal, from which he prays the husband's *dismissal*: at the same time praying the Court "to *retain* the principal cause"—prayers of which, I will only say, that the latter appears to me not very well to

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consist with the former. Such, in substance, as far as I have been able to collect them, have been the several proceedings in this cause.

Now the Court, without any process before it, and consequently without any *assurance*, even that the proceedings, such as I have described them, have been *accurately* stated—(for it can place no great *reliance* in this particular, either on the written statement of those proceedings in the act of Court, into which the protest has been extended, or (indeed still less) upon any supplementary or explanatory statement of them, addressed to it, verbally, in argument by counsel) must look principally, if not solely, in order to determine the merits of the protest, to what appears on the face of the inhibition. Does *that*, on the face of it, or does it not, disclose an appealable grievance, or appealable grievances? By this, almost sole, consideration it is, that the protest must stand or fall; for, whether the Court below was right or wrong in making the orders or decrees appealed from, or in other words, the *merits* of the appeal itself, are matters of which it is incompetent to it to form any *notion* even, under the present proceeding.

This appeal is, *generally*, as appears by the inhibition, from “certain grievances, nullities, iniquities, injustices, and injuries (words, these, of common form) done to, and inflicted upon, the appellant, by the judge of the Court *à quo* :” but it is, *more especially* “from the said judge having, on the third session of Easter Term (to wit, Saturday, the 22nd day of May) in the year 1824, by his order or decree, refused to admit and hear read a certain affidavit, then tendered on behalf of Sabina Mary-Ann Greg, (the appellant): *and also* from the said judge having, by the said order,

or decree, rejected the prayer of the proctor of the said appellant "to rescind the order or decree made by him, the said judge, on the third session of Michaelmas Term, 1823, whereby he decreed publication in the cause, and assigned all facts to be propounded:" *and* from his having refused to direct the registrar to tax the costs made, and to be made, on behalf of the appellant, and to enlarge the term probatory, until the said costs should have been paid; and further, to allow a reasonable time, after payment of the said costs, for the examination of witnesses upon the allegation given in on behalf of the appellant: *and* from his having concluded the said cause, and assigned the same for informations and sentence"—to the "manifest injury of justice, and to the very great detriment and prejudice (words of common form again) of the said Sabina Mary-Ann Greg, the said appellant."

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Such then, on the face of the inhibition itself, to which an appearance under protest has been given in this proceeding, are the orders or decrees of the judge of the Consistory Court, *specially* appealed from. It appears to me that they are orders or decrees of a very different complexion, and that they are subject, in this respect, to very different considerations.

The first alleged grievance is, the judge's "refusing to rescind an order." Now the very *praying* of the judge to rescind that order is, *pro tanto*, an acquiescence in the order; it is an act of the party, subsequent to, and in respect of it, which, in my judgment, is sufficient to perempt any after appeal; that is, from the *order itself* (a). As to the mere "refusal to rescind an

(a) And this, it should seem, notwithstanding a protocol of appeal entered; for it was distinctly stated in the act of Court by the proctor

1824. order," *that* is a matter *not* appealable, but one solely  
*Michaelmas* in the judge's own discretion, in my view of it.  
*Term.*

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The order or decree next *specialy* appealed from, is one, her right to appeal from which the party appellant had perempted by no act of her own, that I am aware of. But is that order or decree itself an appealable grievance? I strongly incline to hold that it is *not* an appealable grievance; being, like the refusal to rescind an order or decree, as already said, a matter purely discretionary. It is expressly so laid down in books of practice—in Oughton, for instance—" *Si in die assignato,*" says Oughton, [tit. 116] "*ad proponendum omnia pars actrix, sive rea, habuerit testes necessarios presentes in judicio, et juraverit eos esse testes necessarios, judex eosdem admittere, jurare, et examinare potest:—tamen relinquatur judicis arbitrio, an voluerit hujusmodi testes admittere vel rejicere, et neutri partium datur justa causa appellandi.*" If then the judge's refusing to permit witnesses to be examined, who are actually present in Court, on the day assigned to propound all facts, and who are sworn to be necessary witnesses, be no appealable grievance, surely his declining to assign, at large, a new term probatory on that day, (especially too at the prayer of a party who had suffered the original term probatory to stand open a twelve month without producing a single witness) no single witness being present in Court, and no single *affidavit* being tendered as to any proposed witness or witnesses being a necessary witness, or

for the wife that " within 15 days from the third session of Michaelmas Term, 1823, to wit, on the 1st day of December, 1824, he, the said proctor, had duly interposed his protocol, protesting of a grievance and of appealing." And such protocol of appeal was brought in, in part proof of the act.

necessary witnesses, (nothing of all which is even alleged to have occurred, in this instance)—surely this I say, *a fortiori*, is no appealable grievance, and the Court is quite disposed, upon this authority, to view it in that light.

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So far, then, this appearance under protest to the inhibition (a proceeding by the way of rather a novel nature) might seem to stand upon reasonable grounds. But what subsequently appears on the face of the inhibition, goes to deprive it of this credit, both almost, and altogether. For what are the other acts appealed from, as appears by this? Why *they* are appealable grievances beyond all question, and such as the appellant has perempted her right to appeal from by no circumstance whatever, even as alleged, in the cause. Her petition as to costs is rejected—the cause is concluded, and assigned for informations and sentence, without time afforded her even to *see* the depositions; so that, clearly, she has had no opportunity of objecting to the testimony of the husband's witnesses, how objectionable soever, on inspection, that testimony may turn out to be. I do not mean to say that all this may not have been (I am rather indeed bound to *presume* that it was) very right—there has apparently been great, and studied, delay on her part—it may even have been so great, and so vexatious, as *justly* to debar her from those privileges to which she would ordinarily have been entitled; for instance, that of having her costs taxed, and that of having time afforded her to bring in an exceptive plea, if so advised, after inspecting the depositions; from both of which these orders of the judge, now complained of, went actually to debar her. But the Court, without any process before it, with merely this inhibition, and act of Court, or ex-

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tended protest, cannot undertake to decide all this, or any part of it. Meantime these orders and decrees being clearly of an appealable nature, without any circumstance even alleged to perempt *this* appellant's right, in special, to consider and treat them as such, I am clearly of opinion that this appearance under protest is wrong, and that I am bound to overrule it, and entertain the appeal. By so entertaining the appeal, I am not to be understood as, in the slightest degree, prejudging the merits of it—the merits of the appeal constitute a totally different question, and one of which it is incompetent to the Court to form any notion without seeing the process. It is one thing to say that such or such an order is of an appealable nature, that is, generally, *may be* appealed from; it is quite another to say that it *is* duly and fitly appealed from, under all the circumstances, in any particular instance.

I would only add that no blame whatever attaches to the appellant *for* including all the several acts done (as well those of an appealable nature as the other) which she *has* included, in the *presertim* of her appeal. For being, *all*, the act of one Court day, they all make up but *one* decree—at least, so as to warrant, the inhibition's going as to the whole. It will be for the Court to distinguish between these at the hearing—applying, possibly, its remedy as to those of the one class—leaving the appellant, as it must, without remedy as to those of the other; those I mean of a nature not appealable. Meantime I overrule this protest, and with costs; both as the proceeding itself has somewhat the appearance of an experiment, and as the parties to it are husband and wife. Upon these grounds, and without, at present, entering into the question of



whether the wife is, or is not, entitled to her costs. 1824.  
in that character *generally*, I think her, at least, en- *Michaelmas*  
titled to the costs of the present proceeding. *Term.*

Protest overruled, with costs. (a)

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(a) On an extra Court day (25th of February) after Hilary Term, 1825, the Court pronounced for the appeal, so far as respected the cause having been *concluded*, as stated in the judgment; but in all other particulars affirmed the decree of the Court below. At the same time, it gave leave to the wife to proceed to the examination of witnesses on her allegation; provided this were done, *immediately*, and at her own expence. It appeared in the cause that the wife had a considerable income; and that the husband was in distress and in gaol. Under these circumstances the Court approved of the Court below having rejected the wife's petition for her costs: on the principle (often recognized) of the *ordinary* rule as to the wife's costs in cases of this nature, not applying.

The principal cause was heard on the merits, and finally disposed of in Trinity Term, 1825—the Court, in the absence of any evidence on the part of the wife, upon whose allegation, after all, no witness was examined, pronouncing the sentence of restitution prayed by the husband.

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BARKER v. BARKER.

2d Session

(On Appeal from the Consistory Court of London.)

**THIS** was a cause of divorce for adultery brought by Samuel Barker, against his wife Amelia Penelope Barker. It was appealed by the husband to this Court from the Consistory Court of London the judge of which had *dismissed* the wife.

If a deed of separation be so worded as *rightly* to found a presumption that it might (so intended) go to sanction even adultery

committed by the wife, living apart from the husband under that deed—that presumption must be rebutted by evidence, to entitle the husband to a sentence of divorce, as by reason of such adultery committed by the wife.

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Sir JOHN NICHOLL.

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v.

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This is an appeal from the Consistory Court of London, where the cause was a cause of separation, *à mensa et thoro*, promoted by the husband against the wife for adultery. A libel was given in, in the Court below, pleading the adultery: and, upon the evidence of nine witnesses examined upon that libel, the cause went to a hearing. In the course of the hearing, the judge directed certain articles of separation into which the parties had entered, previous to the adultery charged, to be brought in—as with reference to which, in connection with the facts (the *only* facts *then*) proved, he, after some deliberation, pronounced the husband to have failed in proof, and dismissed the wife; which has given occasion to the present appeal.

It appears that these parties were married in 1815, the wife being at that time a minor: and that they cohabited as husband and wife from that time, principally at Clifton, till March 1820; when, in consequence, *as pleaded in the libel*, of “*certain differences having arisen between them,*” they agreed to separate. The deed of separation, just adverted to, was accordingly drawn up, and was executed by both parties, on the 18th of that month. The wife then removed to Teignmouth, in Devonshire, where she lived with her mother, Mrs. Burden; the husband continuing at Clifton—nor did they ever, from that time, cohabit as husband and wife, save for a few days; when they met at Bath, and so cohabited, at the latter end of December 1820. Mrs. Barker returned from Bath to Teignmouth—but, in the month of February, 1821, about five weeks after, she eloped from that place with

a person named Thomas Bailey Potts, whom she had become acquainted with at Teignmouth, in the course of the preceding year. The husband, on being informed by the mother of his wife's elopement, immediately comes to London and institutes inquiries, which terminate in a discovery, by certain friends of the husband, of the wife in the society of her paramour, under circumstances quite unequivocal, at an inn at Hampton Court. The wife is, with some difficulty, prevailed upon to accompany the husband's friends to London, where she is placed under the protection of an uncle, her mother's brother; but, in about three weeks, she again elopes, with the same companion, and goes to France, where they are *said* to have since cohabited. Of this subsequent elopement and cohabitation, there is no *proof*—but of the first, from Teignmouth, and of the adulterous connexion of these parties at Hampton Court, the proofs are clear and ample.

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The Court neither supposes, nor has been given to understand, that the judge of the Court below entertained any doubt that the adultery was proved, as charged in the libel. His reason for declining to apply the *usual* remedy in that case, seems to have been this. He appears to have considered the deed of separation so ample in its stipulations for the wife's perfect free agency, for the future, in *all* respects, as to found a *presumption*, that it might (so intended) do this among the rest; namely, license that very conduct in the wife of which the husband complained (*a*). And that presump-

(*a*) The parts of this deed principally relied on to found that presumption were the following—"Now this indenture witnesseth, and the said Samuel Barker, and Amelia Penelope Barker his wife, do hereby mutually declare and agree, that they shall, and will continue to live separately and apart from each other, henceforth, for and during the time of their

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tion, if rightly *founded*, not being rebutted by any facts in evidence in the cause, *as it then stood*, would justify the sentence appealed from, in its fullest extent, in my judgment. *Volenti non fit injuria*—and, though the mere separation of husband and wife is no bar to relief at the suit of one, for adultery committed by the other,—yet where a separation subsisted at the time of the adultery charged, it is peculiarly incumbent on the party charging it (especially that party being the husband) to make out, most satisfactorily, to the Court, that the injury complained of is not one to which he or she, the complainant, is in any sort accessory.

Now I think I am bound to take it, that the presumption on which the judge of the Consistory Court

mutual lives. And the said Samuel Barker, for himself, &c. doth hereby covenant and agree with the said Amelia Penelope Barker, &c. that it shall and may be lawful to and for the said Amelia Penelope Barker, from time to time, and at all times, during the present coverture, to live separately and apart from him the said Samuel Barker, in such manner, and at such place and places, and with such person and persons, as she the said Amelia Penelope Barker, shall, from time to time, think proper to chose, (notwithstanding her present coverture) and as if she were sole and unmarried. And that he, the said Samuel Barker, shall not, nor will, molest or disturb her, the said Amelia Penelope Barker, in her person or manner of living; nor at any time or times hereafter, either by ecclesiastical censures, or otherwise, require, or endeavour to compel her the said Amelia Penelope Barker to cohabit, &c. with him the said Samuel Barker; and shall not, nor will for that purpose, or otherwise, use any force, violence, or restraint, to the person of the said Amelia Penelope Barker; or sue, or cause to be sued, any person or persons whomsoever for, or on account of, receiving, harbouring, lodging, protecting, or entertaining, her, the said Amelia Penelope Barker; but that she shall and may, in all things live and act as if she were sole, and unmarried; without the restraint or coercion of the said Samuel Barker, or of any person or persons, by or through his means, assent, consent, privity, or procurement."

acted, as above, was rightly founded, and consequently that his sentence was correct. But, whether, in true legal construction, the deed in question, were, or were not, *in itself*, what he appears to have considered it—whether it did, in itself, amount to license, even the commission of adultery by the wife; or whether the clauses relied on to sustain that construction, were not rather technical clauses, ordinarily inserted, whether rightly or wrongly, in instruments of this description, to prevent, so far as may be, suits for restitution, and not to bar suits for divorce in the event of adultery committed, are questions, which, as merging in the present case, the Court may be excused from exercising any definitive judgment upon. For even although the Court should put the *same* construction upon this deed, as it received in the Court below, it may arrive at a *different*, conclusion, upon the evidence, without any impeachment of the former sentence. The presumption which this would raise against the husband, would then, it is true, be the same in both Courts: but whereas, that presumption in the Court below was not, as I have said, rebutted by any evidence; it is, in this the appellate Court, I think, amply so rebutted. For the husband in this Court, as he was fully entitled to do, has brought in a further allegation, pleading the circumstances, under which the original separation was had, and a correspondence by letter, which took place between him and the wife, subsequent to the separation—several letters from the wife being exhibited, in supply of proof; as also, the letter from the mother, in which she communicated to her son in law, the first information that he received of his wife's elopement. From the evidence taken upon this allegation, and from

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the face of these exhibits, I collect, both that the husband was not to blame in the matter of the separation—and that the deed of separation was understood neither by husband or wife, as dispensing to either, with the obligation of fulfilling the marriage vow, in the article of fidelity, so far as the consent of the other party was concerned; however the contrary might *seem*, upon the mere wording of the deed. The separation it appears took place, at the wife's instance, upon no, imputed even, misconduct on the husband's part; but in consequence, solely of differences that arose between them, as to a change of trustees for certain property, to which the wife was entitled under her father's will, Her letters exhibit the wife as a strange, flighty, romantic character at all times. In these, (after the separation) so far from imputing blame to the husband, she addresses him, uniformly, in terms of ardent affection. She visits, and as already observed, cohabits with him, for some days at Bath, in December, 1821. No blame again is imputed to the husband on that occasion; a letter is exhibited of a date subsequent to this even, as affectionate in its language, at least, as any of the preceding; in which, in particular, she hopes that they "shall soon be united again, never again to part." That the vast fondness expressed for the husband, especially in this last letter, was rather feigned than real, may readily be conceded; as it appears, that she was previously on pretty intimate terms with her paramour, and actually eloped with him, within a few weeks from the date of that letter. But real or dissembled, the sentiments expressed are equally good in proof, that no just foundation for any complaint was laid in the conduct of the husband

to the wife—if they were partly meant, which is very probable, as a blind to the husband, this at least shews the wife not to have suspected that she had the husband's licence to commit adultery. Again, the mother's letter, a letter, expressive of great anger, and at the same time, of great distress, conveys no reflection whatever on the husband, in apprizing him of the wife's elopement; and the promptitude with which that information is acted upon by the husband, to vindicate his own honour, fully rebuts any presumption which might grow out of the deed of separation, taken *per se*, that he was at all a party consentient, *à priori*, to his own disgrace. The case here then has a different aspect, to that which it had when before the judge of the Consistory Court; and without definitively pronouncing whether, in my judgment, the deed of separation, taken *per se*, did or did not, of itself, raise, as against the husband, that presumption upon which *he* appears to have acted, but taking it so to have done, I am of opinion, that, under the explanations to which I have adverted, and upon the matter thus cleared up by the additional allegation in this Court, there is, even upon that supposition, nothing any longer to debar the husband of his remedy; but that he is, now at least, intitled to the sentence of separation, which he prays.

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MOGG v. MOGG.

(By Letters of Request from the VICAR-GENERAL  
of the Diocese of BATH and WELLS.)  
4th Session.

(On the Admission of the Libel.)

The wife's libel in a divorce cause, charging cruelty, and unnatural practices, on the husband, admitted to proof—the case charged (at least taken as a whole) being held to be one “*per quod consortium amittitur*.”

**THIS** was a cause of divorce or separation *a mensa et thoro*, brought by the wife against the husband, for cruelty, and unnatural practices.

The *Libel*, after pleading the marriage and cohabitation, &c. of the parties, in the usual form, pleaded (somewhat *generally* indeed) *that*, from the beginning of the year 1820, till the month of June in that year, when she, the wife, quitted him and went to reside with her mother, the husband treated the wife with great unkindness, indignity, and cruelty; refusing to cohabit with her during all that time, either at bed or board—in consequence of which treatment (so pleaded) she, the wife, in the month of May in that year (1820), suffered a convulsive labour, at which her life was considered to be in great danger. It then pleaded, *that* the said R. M. (the husband) had, at the assizes, held in and for the county of Somerset, at the City of *Wells*, in January, 1823, been convicted of assaulting one E. K. his apprentice lad—and of lewdly, wantonly, and wickedly pressing, &c. the said E. K.—and of endeavouring to persuade the said E. K. to permit and suffer him the said R. M. to take indecent liberties with his person—to the corruption of the morals of the said E. K. to the great scandal and subversion of



decency, &c. and against the peace (a). Lastly, it pleaded a certain paper writing annexed, to be, and contain, a true copy of the record of that conviction.

*In* OBJECTION to the admission of this *Libel*, it was submitted that the cruelty, *per se*, as charged, was too vague, and unspecific. With respect to the *other* charge, it was said—in the case of *Bromley v. Bromley*, the sole precedent, (b) the conviction was of an assault with actual intent to commit, &c. Not so here—here the conviction was of a *minor* offence, though one of the same *kind*. And it might be *doubtful* whether the conviction of a husband for such *minor* offence would entitle the wife to a sentence of separation, *a mensa et thoro*, merely upon *that* ground.

COURT.

Sir JOHN NICHOLL.

The case laid, as a whole, does amount, in my judgment, to that *per quod consortium amittitur*. Could the Court send the wife home to such a husband? He refuses her access to his person—he resorts to abominable practices, cruelty, itself, independent of that other charged. But the Court may be compelled to send the wife home, if it should be of opinion that her case is *not* such as to entitle her to a sentence of separation.

(a) The *bill found* consisted of four counts; the first charging an assault on E. K., to the effect stated in the text—the second and third, assaults on the said E. K. of a similar, but still more aggravated, species; and the fourth, an assault on the same subject, generally. But the verdict found the defendant guilty of the offences charged in the first and fourth counts only—whereon he was sentenced to the payment of a fine of one shilling, and to imprisonment in the common gaol, for six calendar months.

(b) *Delegates*, 1793. See page 158 *ante*, in *notis*.

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On the contrary, I think that the wife, on proof of her case, *as laid*, will entitle herself to a sentence; under which impression of course I admit the libel (*a*).

(*a*) This cause was finally heard in Trinity Term, 1825; when, the libel being proved in all particulars, the Court pronounced *for* the divorce as *prayed* by the wife.

By Day.

### NORTHEY v. COCK.

In interest causes, where the suitor whose interest has been denied, succeeds in establishing it, costs follow, almost of course, without some special ground of exception to the rule.

Note, that the certificate of registry is not essential to the proof of a marriage; especially not to the proof of a marriage had, if at all, anterior to the marriage act.

**THIS** was a cause of interest—in which the Court, in pronouncing *for* the interest of *one* asserted next of kin, condemned the *other* in full costs; as having questioned that interest, under the circumstances stated in the judgment, on frivolous and unfounded pretences.

#### JUDGMENT.

Sir JOHN NICHOLL.

This is a cause, technically described as a *cause of interest* (originally depending in the Consistory Court of Exeter) (*a*); and it is limited to the single object of ascertaining the next of kin of Mary Row, late of Broadwoodwiger, in the county of Devon, the party deceased in the cause. The suitors, respectively, are Mr. Emanuel Northey, and Mr. Richard Cock. Northey claims as cousin-german once removed by the whole blood—as, that is, descended from the same common ancestors with the deceased, William Drown and Joan his wife, the grandfather and grandmother of the deceased, and his, the claimant's, great-grandfather and great-grandmother, respectively. The claim

(*a*) It was appealed to this Court, on a grievance—when the Court pronounced for the appeal, and retained the principal cause.

of the other suitor is founded upon his descent from the same grandmother with the deceased only, Joan Drown—who, after the death of William Drown, her first husband, is pleaded to have intermarried with one Diggory Cock, by whom she became the mother of Diggory Cock, father of Richard Cock, the party claiming.

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Thus it appears that the asserted relationship between Richard Cock and the deceased, is by the half blood only. But as the law makes no distinction between the whole and the half blood, in respect to administrations, and rights of succession to *personal* property, it follows, that if Cock's relationship to the deceased is proved, as pleaded, there is an end, at once, to Northey's claims, either to be administrator of the deceased, or upon her personal property. For, as to the administration, Mr. Cock is of kin to the deceased, upon this shewing, in the nearer degree: nor is Mr. Northey entitled to any share of the personal estate, even by representation, no representatives being admitted among collaterals after brothers' and sisters' children.

The claim of Mr. Richard Cock appears to be questioned only in a single particular. His being the grandson of Joan Drown, also the grandmother of Mary Row, the deceased in the cause, is admitted: but Mr. Northey has denied that this Joan Drown was ever married to Diggory Cock, her alleged second husband; asserting that, although she lived and cohabited with him, as such, till his death, it was in a state of concubinage merely, and that she never became his lawful wife.

Now here I must first observe that the burthen of proof principally rests with Mr. Northey. Where parties

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have cohabited, especially where, for a long period, and till the death of one of them, as in this instance, the law *presumes* them to have been married; for it will not presume a criminal and illicit connexion between parties,—at all events not, to the prejudice of their issue. As then Mr. Northey (rather ungraciously) has raised this charge against his great-grandmother, he should have been prepared with evidence to sustain it; in which point, as I shall presently observe, he has wholly failed. On the contrary, to say nothing of the legal presumption in its favour, the actual marriage of this Joan Drown and Diggory Cock is established by their grandson, Mr. Northey's opponent in the cause, upon what appears to me the most satisfactory evidence.


The marriage in question is one of more than a century back; consequently, it was a marriage anterior to the marriage act; when marriages were neither solemnized, nor registered, with the regularity that they have since been, in virtue of that act. To hold the certificate of registry *indispensable* to the proof of such a marriage, would be absurd: reputation, cohabitation, and mutual acknowledgments sufficiently prove, at least, *such* a marriage (a) in such a cause, if not strongly impeached.

(a) Or probably *any* marriage, the marriage act having been repeatedly held not to take away the ancient mode of proving a marriage by presumptive evidence. See judgments to this effect of Lord Mansfield, in the case of *St. Devereux v. Much Dew Church*, [1 Bl. Rep. 367] and that of *Birt v. Barton*, [Doug. 171]. And Lord Kenyon has declared, in a case at *Nisi prius*, [Espin. 1, 214] that though the marriage act had introduced a register of marriages, registration made no part of the validity of a marriage, but only went in proof of it—and that since, as well as before the passing of that act, cohabitation, reputation, mutual acknowledgments, &c. were good and available evidence of a marriage, though no register whatever was produced.

But though no entry can be found in any register of the marriage of Joan Drown and Diggory Cock, there is documentary, as well as oral, evidence in the cause, (though the latter alone might possibly be sufficient,) which places the fact beyond any question. For instance, the parties had three children—these children were christened in the parish where they always resided, as the children (two sons and a daughter) of “Diggory Cock and Joan *his wife*.” Again, one of the sons (a first Diggory) died: he is buried in the same parish as Diggory, son of, “Diggory Cock and Joan *his wife*.” Extracts in proof of all this from parish registers, are exhibited, and duly verified, in the cause. Lastly, on the death of Diggory Cock, administration is granted to Joan, as his *lawful widow and relict*, of course, upon her oath to that effect; and, on real property being sold which had belonged to Diggory Cock, subsequent to that grant, she, Joan, is a party to the conveyance, as his “*widow and administratrix*.” These facts are also proved by duly verified exhibits in the cause. Of witnesses examined, the testimony is all one way, namely, in favour of the marriage, for Mr. Northey has produced no evidence upon his *allegation*, that “*the Cocks were generally known and reputed as base born*.” Nor has he succeeded in extracting any such evidence, by cross-examining his adversary’s witnesses, except in a single instance of much too trifling a nature to be dwelt upon. I allude to the evidence of one old blind man, of 83, who does say, in answer to an interrogatory administered to him on the part of Mr. Northey, that a person named Parkinson told him, some years ago, that these “Cocks” were all “*base born*.”

In proof of this, some stress appears to have been

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laid upon the circumstance that Mr. Cock himself, upon the death of the deceased, confessed or *admitted* that “her *property*,” generally, belonged to “the Northeys.” But this circumstance is sufficiently explained. Being of the half blood, and not aware of the legal distinction, in this particular, between the descent of real and that of personal property, he did, at first, erroneously conceive that Northey was entitled to the *personal*, as he is to the *real*, property of the deceased; under which impression, and not, as asserted, from any consciousness of his father’s illegitimacy, he made the admission relied upon. But he retracted this, almost instantly, upon receiving better information; and from that time to the present has asserted his interest, an interest which, in my judgment, he has amply proved.

The single question, under these circumstances, is that of costs; to which I think that Mr. Cock, whose interest has been denied upon such frivolous pretences, is justly entitled. Indeed costs generally follow, where the person whose interest has been denied succeeds in establishing it, almost of course, without special grounds of exception, of which I can discover none in the case in point. On the contrary, Mr. Northey, not content with the real estate, having called in the administration duly obtained by his opponent and put him on proof of his interest by setting up a case that he has failed to sustain by *any* evidence, he is, I think, *especially* liable to reimburse that opponent for his expences in both Courts.

SULLIVAN v. SULLIVAN.

(By Letters of Request, from the Archdeacon of  
Buckingham.)

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By-Day.

**THIS** was a cause of separation, *à mensa et thoro*, by reason of adultery, promoted by John Augustus Sullivan, against his wife, Maria Sullivan.

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit of divorce, brought by the husband against the wife, by reason of adultery. It is admitted, that the proofs of adultery are complete, if the *identity* of a female, whose history is given in the depositions, and of Maria Sullivan, wife of the party promoting, and the party proceeded against, in this suit, be established in a manner satisfactory to the Court. But of this *identity* I entertain no doubt, either legal or moral, on the proofs—any more than I do, of the *diversity* of the husband, and of a person whose intercourse with the wife, is proved to have been such, as fixes upon the wife, (that *diversity* being also proved) the charge of adultery.

The marriage of the parties took place in July, 1816; from and after which, they cohabited, *for a short time*, and mutually acknowledged each other, as husband and wife. A suit was then instituted by the father of the husband, (a minor at that time of the age of 17 or 18) to annul the marriage, as celebrated by banns not published in the true names of one of the parties— unquestionably a sufficient ground of nullity, had the fact so been. But at the hearing of the cause, in the

The mere desertion of a wife by the husband, though a malicious desertion, will not bar a sentence of divorce, at the suit of the husband, on proof of adultery committed by the wife. The long absence of the husband from, held not to be a desertion of, the wife, in the particular case; and the sentence held not to be barred, as insisted, by any part of the husband's conduct towards the wife, her adultery being proved.

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month of June, 1818, the judge of the Court in which that suit was instituted pronounced for the validity of the marriage—and the sentence so had, on appeal to this Court, was affirmed, also in the month of June, in the following year. It was then appealed, namely, *from* the sentence of this Court, to the high Court of Delegates; nor was that appeal actually dismissed till the month of February, in the present year [1824]; although it had not been prosecuted by the appellant beyond to the mere bringing in of a libel of appeal; to which the respondent had, at once, given a negative issue.

Upon the institution of the suit of nullity in 1816, the husband was sent abroad by his father, to await its issue. He was soon joined on the continent, by his father and mother; and continued abroad till February, 1822; at which time the appeal in the Court of Delegates, as just said, was still depending—having, during the greater part of that time, been attached to the British embassy at Paris. The circumstances to which the Court has referred, as connected with the marriage, account, I think, satisfactorily for this part of the history. But I should say, that *on* the husband's coming of age, a deed of separation is executed by and between the parties; covenanting for their *living*, in future, separate and apart: an annuity for life of 500*l.*, and the sum of 1000*l.* by way of outfit, being settled on the wife, in and by that deed.

The wife, during all this time, continued in this country, resident at various places—as first, at a place called Gold Hill, near Chalfont in Buckinghamshire; and then at lodgings in Mary-le-bone, until the spring of the year 1821—at the former of which places it is, that she is proved to have become intimate with



a Mr. Henry Gouldney, her alleged paramour. At what precise time, that intimacy assumed the character which now attaches to it, neither is, nor requires to be, stated in evidence. Suffice it to observe, that in April, 1821, the wife, Mrs. Sullivan, went to reside at Mottingham, near Eltham, in Kent, where she continued till the month of April, in the following year—and that, during nearly the whole of that period, she, Mrs. Sullivan, and Gouldney, cohabited as husband and wife: passing however under assumed names, and using every precaution, (as by suffering no trades people to enter, or even to come within the outer gates of, the house, which is described as situated in a spot considerably secluded, &c.) clearly, as it should seem, in order to avoid any detection of this intercourse by, or on behalf of, the husband. The same, at Nelson Square, in the neighbourhood of Newington, to which they removed after leaving Mottingham; and then at Loosely Row, in the parish of Princes Risborough, in the county of Bucks.; where Mrs. Sullivan was resident, at the issue of the citation in the cause. And it is in proof, that the fruit of this intercourse has been two children, to whom the wife has actually given birth; without any pretended connection with her husband, the complainant in the cause.

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So far then as respects the adultery charged on the wife, the case is fully proved. Now being so proved, and *actual* connivance, at least, on the part of the husband not being suggested; what is there, let me ask, to justify the wife's violation of her marriage vow; and so, to deprive the husband, in this particular instance, of that remedy, to which the wife's infidelity plainly intitles a husband, under *ordinary* circumstances?

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It has been argued, that the husband's going, and his long sojourn, abroad, amounts to a *malicious desertion* of the wife; and that *this* should operate as a bar. Now here, in the first place, I am still to learn, that even a *malicious desertion* of the wife by the husband, is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife. By the law, indeed, of some countries, *malicious desertion* is a substantive ground of divorce, at the prayer of the wife, *against* the husband; but not even there, that I am aware of, it licences adultery on the part of the wife, by precluding the husband from a sentence of divorce on proof of its commission. Certainly, however, that neither is, nor ever has been, a doctrine of the law of this country; which also, as it is well known, has not recognized even malicious desertion as a substantive ground of divorce. But, though secondly, principally, I am clearly of opinion, that in true legal construction, the husband's absence from, was any thing but a malicious desertion of, the wife, under the circumstances of the case. At the time of the husband's going abroad, a suit (then just instituted) was depending, to try the validity of the marriage: nor was that question *finally* disposed of till long after the adulterous connexion formed by the wife, on which, being proved, the husband now relies for a sentence. But during the pendency of that suit, cohabitation was not only not incumbent, by law, on the parties, or on either of them; it would even have been legally censurable, at least in the husband. Nor could the wife at any period, till after that when she had forfeited her conjugal rights by the actual commission of adultery, have sued the husband for restitution, had he been resident in this country.

Of one feature, at least, of malicious desertion, there is a total absence of any appearance in the cause—I mean that feature (often a very principal one in the character of malicious desertion) which discloses itself, in the circumstance of the wife being left *unprovided for*. She was amply provided for out of the husband's funds, on his becoming of age, as already said by the Court, 'undèr the deed—and, up to that time, she had been alimènted at the rate of 300*l.* per annum, by the Courts in which the suit of nullity successively depended.

But the *deed of separation* has also been urged in bar of the husband's prayer. Now these Courts have so repeatedly said that such "deeds of separation" are no bars, either, on the one hand, to suits for restitution, or, on the other, as here suggested, to charges of adultery, that it would be quite superfluous to combat this argument, looking at the deed of separation between these parties, *quod* deed of separation merely. But it has been said, that *this* particular deed of separation, by the very wording of it, amounts to a letter of license to the wife, to conduct herself howsoever, and to connect herself with whomsoever, she pleases. But I see nothing in the deed, even taken *per se*, which necessarily implies this. I see no more in the deed than the ordinary class of provisions (a) for enforcing, so far as

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(a) "Now this indenture witnesseth, that in pursuance of the said agreement, &c., he, the said John Augustus Sullivan, doth covenant, &c. that the said Maria Sullivan may, at all times hereafter, live separate and apart from him, the said John Augustus Sullivan, her husband as if she was sole and unmmarried; and that she shall be free from the power and command, restraint, control, and authority, of him the said John Augustus Sullivan; and shall and may live, and reside, in such place or places, and in such manner, as to her, from time to time, shall seem meet: and that he, the said John Augustus Sullivan,

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may be, the continuance, and preventing the determination, of the separate state in which the parties covenant to live, by means of a suit for restitution brought by either, which, nearly in all cases, find their way into deeds of this nature; though nugatory as to any binding effect on the parties, in this particular, as already, hinted. But what again, *as appears in evidence*, has been the conduct of the parties to the deed? Does *that* countenance the interpretation sought to be put upon it by the wife's counsel? Does *that* give it to be supposed that either the one gave, or the other took it, as a letter of licence to the effect contended? Quite the contrary. Did the wife consider it a letter of licence to connect herself with Mr. Gouldney? The clandestinity of that connexion, to which I have already alluded, shews it not to have been so regarded on *her* part. And as to the *husband*, it is not denied, that *immediately* on receiving intimation of what the wife's

shall not, nor will, molest or disturb the said Maria Sullivan in her person, or in her manner of living, &c., nor, at any time or times hereafter, by suit or process in the ecclesiastical Court &c., or by any other means whatsoever, seek or endeavour to compel, the said Maria Sullivan, to cohabit or live with him the said John Augustus Sullivan, or to enforce any restitution of conjugal rights; and shall not, or will, for that purpose or otherwise, use any force, constraint, or violence, to the person of the said Maria Sullivan; or sue, or cause to be sued, any person or persons whatsoever, for receiving, harbouring, lodging, protecting, or entertaining her--but that she, the said Maria Sullivan, may, in all things, live, as if she was sole and unmarried, without the restraint or correction of the said John Augustus Sullivan, or of any other person, or persons, by, or through his means, consent, or procurement." It will be seen that these provisions are precisely similar to those in the deed of separation in the cause of *Barker v. Barker*. Vide page 287, ante in *notis*.

conduct had been, he takes steps to bring the matter to its present legal issue; without any suspicion, as it should seem, that he had licensed the wife to form any such connexion as that, which is the foundation of this suit—although the mere production of the deed, if a letter of license to the wife to form such a connexion, would at once defeat the sole object of the suit, as he himself must have known.

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The Court has been urged, over and over, to consider the ill effect which it has been partly argued, and partly assumed, that a sentence of divorce in this cause will have on *public morals*. This, of course, as with reference to the supposed countenance that *immorality* will derive, from a husband so circumstanced as the plaintiff, taking advantage, as it has been phrased, of his wife's infidelity. But is the Court, by withholding its sentence, to leave it to be inferred, as it must do, that a wife, even one so circumstanced as the defendant, has its sanction to commit adultery? I hardly think that, of the two alternatives, *this* is the one *least* likely to countenance *immorality*. What should have been the wife's conduct in the peculiar circumstances under which I admit her to have been placed? Its object should have been, to qualify herself, during his absence, by mental and moral improvement; for the husband's future society; which might then, notwithstanding the state of *actual* separation in which they were living, have been ultimately afforded her. Instead of so doing, by abandoning herself to her vicious inclinations, she has clearly *founded* the sentence of *legal* separation now prayed by the husband—which, as thinking him justly entitled to it, under all the cir-

1824. cumstances of the case, in spite of what has been urged  
*Michaelmas* to the contrary, I accordingly pronounce. (a)  
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SULLIVAN. (a) Mr. Sullivan has since obtained an act of parliament by which the marriage was dissolved: although he and his wife were living separate, as above, (in effect had never cohabited) when the adultery in proof was committed by the wife. To compensate for this *ordinary* requisite (namely the cohabitation, at that time, of the parties) to the passing of such an act, it seems, that the two houses examined witnesses to the wife's *ante-nuptial* incontinence. The editor conceives this to be the *single* instance of their having so done. Such evidence, it may be added has, in *no* instance, been received, to assist in making out the husband's claim to a sentence of separation by reason of his wife's adultery, in the spiritual Court. See *Perrin v. Perrin* vol. 1. p. 1.

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## IN THE PECULIARS COURT OF CANTERBURY.

ENGLAND v. HURCOMB.

v. WILLIAMS.

v. RICHARDSON.

By-Day.

ENGLAND v. HURCOMB.

## JUDGMENT.

Sir JOHN NICHOLL.

Articles  
 against three  
 defendants for  
 brawling, &c.  
 in a church,

THE case before the Court is one already, in part, disposed of by its judgment in the cause of *Palmer v. Roffey* (a), which was heard in Easter Term. It arises pronounced to be proved, and the defendants suspended and condemned in *full* costs—the case of no one of the three, either looking to his own conduct, or that of the promovent, being held to be a case for *mitigated* costs.

(a) See page 141, ante.

out of the same *general* transaction, and the same *general* principles are applicable to it; though in their circumstances, each is a distinct case, independent of the other, and standing upon its own grounds.

The offence charged upon Mr. Hurcomb in the present suit, is the identical offence charged in the former suit against Mr. Roffey. Roffey's offence was that of quarrelling, chiding, and brawling, with Hurcomb—Hurcomb's is that of quarrelling, chiding, and brawling with Roffey. Roffey's offence was held to be *proved*, by the Court—but, in so holding it, the Court intimated its opinion, that Hurcomb, upon his own shewing, (for Hurcomb was a *witness* in that cause) was *in pari delicto*—so that his *shortest* way out of such a suit as the present, should any such be instituted, would probably be that most conducive to his own interest. The defendant, however, has persisted, notwithstanding this intimation, in bringing his cause to a hearing, and in defending it by counsel; though he has profited, to some extent, by the advice of the court, in not examining witnesses upon his defensive allegation; which, of course, renders the evidence, and consequently the expenses on both sides, less considerable in this, than in the former cause; in which witnesses were actually examined to a defensive allegation, although their evidence failed to sustain the defence set up.

In support of the articles exhibited in this cause, depositions have been taken, the result of which, in my judgment, leaves the case satisfactorily proved. It is proved that Hurcomb quarrelled and chode with Roffey, whom he repeatedly called a “common informer,” for hours together, at the polling table—and that, subsequently, he renewed the quarrel in the north aisle,

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 &c.

down which Roffey was proceeding in his way out of the church—a renewal which led to that disgraceful scene of uproar and confusion, stated, and reprobated by the Court, in its former judgment. It is proved too, that Roffey, upon that occasion, was certainly treated with great violence, even that his clothes were torn from his back—but there is no satisfactory proof of any actual “smiting” of Roffey, by Hurcomb, as charged in the articles. The “lifting up of his arm,” spoken to by the witnesses, seems to have been for the purpose of warding off an expected blow; and not for that of actual aggression. The brawling, however, at the polling table, and its renewal in the north aisle, I repeat, are most satisfactorily proved; and the result is, that which the Court anticipated, at the hearing of the former cause.

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ENGLAND v. WILLIAMS.

v. RICHARDSON

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NEITHER of the other defendants, Mr. Williams, or Mr. Richardson, is defended by counsel. They are both proceeded against for quarrelling, chiding, and brawling, upon the same day, (and on the same occasion) as the first defendant. The case against Williams has no *direct* connexion with the quarrel between Roffey and the first defendant; nor is the case of Mr. Richardson, again, immediately connected, either with that, or with the case of Mr. Williams. But the offence of brawling, and an aggravated offence of that description, is proved against both these defendants; against Richardson in particular, whose case, in fact, is the most offensive of the three. Against this defendant is



proved, not only the use of the most opprobrious language, but that of the menaces, (delivered, too, in the attitude) of a prize fighter—it is even proved, that he went so far as to demand the “*card*” of a person, who merely interfered to repress his gross incivility to the rector—a species of implied challenge, tending to *positive* bloodshed—and all this in a *church*; where christian benevolence, and forgiveness of injuries, if any have been sustained, ought especially to prevail. In short, the articles of charge are fully proved against both these defendants.

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ENGLAND  
v.  
WILLIAMS.  
&c.

The only real question in either of the three cases is that of *costs*.

Now the Court has looked in vain for grounds to render either of these cases, like that of *Palmer v. Tijou*, (a) (a still other cause arising out of the same *general* transaction, disposed of here in the last Term) a case for *mitigated* costs. The cause of *Palmer v. Tijou* is dissimilar from either of the three, both as respects the promoters, severally, and the parties proceeded against. As respects the promoters, true it is, that Mr. Palmer was a parish officer, acting, *ostensibly*, in the discharge of his official duty; but the Court is still disposed to adhere to its opinion, entertained at first for reasons already expressed, that the prosecution of *Tijou* was one that originated, to some extent at least, in party feeling, although directed, or advised, by so respectable a body as the vestry of this parish; with which the Court had the

(a) See page 196, *ante*.

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misfortune to differ in opinion as to the propriety of selecting Mr. Tijou, for a party to be proceeded against, rather than one of the present defendants. Here, as in Tijou's case, the promoter is a parish officer, acting in discharge of his official duty, (for, upon Mr. England, as *sidesman*, this prosecution, if proper to be had, clearly devolved; Roffey, the churchwarden, being himself under prosecution for, and afterwards convicted of, a *similar* offence,) without any such circumstance, as, I am still of opinion, existed in that other case, to derogate from *his* claim upon the Court, for *full* protection and indemnity. Palmer too, might possibly look to the parish purse to reimburse him for his expences; *this* promoter has, obviously, no prospect of being indemnified for the costs of the present prosecutions, by any contributions from that quarter. Again, as to the parties proceeded against, Tijou's transgression was one by no means of an aggravated nature; Tijou was, confessedly, no party to the *original* broil—he interfered to protect his churchwarden, Roffey, who was being treated at the time with great actual violence—and his interference, if it had been confined to that object, would have entitled him to praise, rather than to censure. But his language and conduct upon that occasion were extremely reprehensible, whatever his motives might be: and though capable of much excuse; *they* admitted (the former) of no justification. These on the contrary are all aggravated cases; and I think that I am bound to accompany the sentence of suspension, *ab ingressu ecclesiæ* for one month, in each of the three, as in the case of Palmer *v.* Roffey, with *full* costs.

It would have been matter of some gratification to

the Court, to have found any just ground for mitigating the costs in any, or all, of these cases. For this, probably, as giving a triumph to neither party, would have best conduced to allay animosities, and to conciliate that harmony in this parish, which has been, too long, interrupted—an object which, undoubtedly, has not been out of the view of the Court. Still, however, to do justice is a paramount consideration; and I really do not see how, both for the purpose of repressing such offences generally, and for that of affording due protection to the parish officer, officially proceeding in these particular suits; (and whose claim to *full* protection, is derogated from by no circumstance whatever, that I am aware of) I can refuse to condemn all three defendants, Mr. Hurcomb, Mr. Williams, and Mr. Richardson, in costs, *generally*.

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&c.

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IN THE PREROGATIVE COURT OF CANTERBURY.

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HUNTER v. BYRN.

1st Session.

(*On Petition.*)

**HENRY FREDERIC ARBOUIN**, late of Mincing Lane, London, died some time since, having duly made and executed his last will and testament, whereof he

Where objections to an inventory, given in on the oath of an executor, are taken by one

only of various parties, (her interest, too, only derivative) equally interested in the effects of the testator, the rest apparently acquiescing; and where the disclosure of assets sought, refers back to transactions pretty remote in point of date, &c.—under such (and by parity of reason, under similar) circumstances, the court will presume the inventory to be correct, and, consequently, will dismiss the executor, without *strong* grounds laid to induce a contrary suspicion.

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HUNTER  
v.  
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appointed his wife, Elizabeth Arbouin; James Byrn, (party in the cause); and John Sabatier, executors; who took probate, as such, of his will in the month of May, 1803.

The testator, by his said will, directed, that the residue of his estate and effects should be converted into money, and invested in the names of the said James Byrn, and John Sabatier, *upon trust*, to pay the interest, annual dividends, or profits thereof to his said wife, Elizabeth Arbouin, for her life; and from and after her decease, (in the event of the deaths of their common issue, under age and unmarried, a contingency which actually befel in the year 1817), *upon trust*, for the benefit of such person, or persons, as she, the said Elizabeth Arbouin, should, by will or otherwise, lawfully appoint.

Elizabeth Arbouin died, having first duly made and executed *her* last will and testament, whereof she also appointed James Byrn aforesaid, and the Rev. Daniel Veysie, clerk, executors, who duly proved the same in the month of February, 1806; having, in and by such will, directed and appointed, that both her own property, and that subjected to her appointment, by the will of her husband, in the event aforesaid, should, in that event, go to, and be divided among, certain persons in certain proportions—one eighth being limited and bequeathed in the same, to Susannah Hunter, (formerly Arbouin) the other party in the cause.

Under these circumstances, a citation had issued, at the instance of the said Susannah Hunter, calling upon the said James Byrn, as surviving executor of the will of Elizabeth Arbouin deceased, for an inventory, and account of her effects. And the present question re-

spected the validity of an objection taken, on the part of Mrs. Hunter, to the declaration in lieu of an *inventory* exhibited by the said James Byrn, under, and in virtue of, that citation.

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*In* SUPPORT of the OBJECTION it was contended, that the inventory was unsatisfactory, as not duly setting forth the husband's effects, subjected, as above, to the disposal of the wife; to a *constat* of which Mrs. Hunter, as appointee to an eighth of these, was clearly entitled, and from Byrn, the party cited—he, Byrn, being the surviving *executor*, both of husband *and* wife.

ON THE OTHER HAND, it was argued that the objection was unfounded; the inventory itself being satisfactory, in the view taken of it by counsel (in effect, that stated in the judgment). It was also submitted, that the objection was one which, whether founded or not, it might be incompetent to the Court to entertain, on the authority of certain cases determined at common law; and in particular, on that of a late case, *Henderson v. French*, in Maule and Selwyn's Reports. (a).

#### JUDGMENT.

Sir JOHN NICHOLL.

This inventory or declaration is objected to, in a single item. The party who objects, states in her act on petition, that “ she has been informed, and believes, that the sum of 1140*l.*, over which the said Elizabeth Arbouin is, in the said declaration, by the said James Byrn, admitted to have had a disposing power by the will of her late husband, does not constitute, *and is not* in the said declaration, *stated to constitute*, the whole of her late husband's effects, subjected to the disposal of

(a) Vide case of *Telford v. Morison*, formerly *Thomas*, *post* page 319.

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the said Elizabeth Arbouin, as aforesaid,"—that is, as already stated in the former part of the act. And she prays, that "the said James Byrn may be assigned to amend his declaration, either by inserting therein, or by exhibiting separately, a full, true, and particular inventory, of all and singular, such the goods, chattels, and credits of the *husband*, that at any time, since his death, have come to his, the said James Byrn's hands, possession, or knowledge, as, by the husband's will, were directed to be invested, upon trust for the benefit, in a certain contingency, of the appointees of the wife"—of which Mrs. Hunter, I may say, is fully admitted to be one.

Now the property of the husband, so subjected to the wife's disposal, being the "*residue of his effects*," the exhibitant has stated, in substance, both the amount of that residue, and how derived. For he says, *that*, till the death of his co-executor, Mr. Veysie, in the year 1817, he, the exhibitant, scarcely intermeddled in the deceased's effects; save only that, early in that year, "at the time of his, the exhibitant's, bankruptcy, he proved, as executor of the deceased, a debt *against his own estate*, for the share of property due to her, the deceased, on account of a partnership concern, in which he, the exhibitant, and the deceased's late husband, had been formerly engaged;" with the dividends upon which, he purchased the sum of 1500*l.*, three per cent consolidated bank annuities, in the joint names of himself, and Mr. Sabatier, his co-executor in the estate of the husband. He admits the deceased to have had a disposing power over this, by the will of her husband; and this it is of which Mrs. Hunter speaks, in her act, as 1140*l.*, being the sum for which that stock was actually sold out in August,

1821; and which constitutes the supposed objectionable item, in the declaration now excepted to.

The question then is, whether the exhibitant is compellable, upon this statement of facts, to substitute for this sum of 1140*l.*, stated in his declaration, an inventory, in full, of the husband's effects, as now prayed? I am of opinion that he is not compellable, at this time, in virtue, at least, of the present citation, and under the circumstances. The disclosure sought, is very remote in point of time—it is sought by one, whose interest in the effects of the husband is merely derivative; and the citation is for an inventory of the wife's effects only, not those of the husband—although this last, as being a *technical* objection merely, inasmuch as Byrn, the party cited, is the husband's executor, as well as that of the wife, might have been overlooked by the Court, had the party citing him made a strong case *upon the merits*. Both testators have been dead these almost 20 years. Byrn too had co-executors in the management of the estates of both; each of whom is since also dead—and of various legatees, the whole, it should seem, with the exception of Mrs. Hunter, have acquiesced in this sum of 1140*l.*, being, as he states it, *that* residue of the husband's effects subjected, by his will, to the wife's appointment. Now I think, under these circumstances, that I am bound to presume the inventory correct in this particular, without *strong* grounds laid to induce a contrary suspicion. But I have looked in vain for such, in the present proceeding. Nothing in the shape of any omission, or suppression, is *specified*—all which her act states (unsupported too by any affidavit) is, that she, Mrs. Hunter, has been informed, and believes, that this sum of 1140*l.*, is not the *whole* of her late husband's

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effects, subjected to the wife's disposal by his will. On the contrary, it is *sworn* by Byrn, *generally*, at the end of his declaration, that no *further* or *other* goods, chattels, or credits, of the deceased, (the wife) have at any time come to his, the declarant's, hands, possession, or knowledge, than those inserted in the declaration; which would be plainly *false*, if this sum of 1140*l.* did not constitute the whole of the effects, subject to her disposal, under the first testator's will, as above. It is *in effect* then, both stated and sworn, in this declaration, to constitute that whole, though Mrs. Hunter *says* otherwise in her act—and I think that I am bound to presume that statement, so made and sworn, to be correct, at least for any thing that appears to the contrary on the face of these proceedings; and, consequently, that I am bound to dismiss the party cited from the further effect of the citation.

1st Session.

(In the goods of SAMUEL ROLLS, deceased.)

(*On Motion.*)

The Court will not decree probate, even in common form, of alterations in a will, so made as, in themselves, and on the face of them, to be only cursory, and deliberative, upon

**SAMUEL ROLLS** of Tottenham, in the county of Middlesex, Esq. (the party deceased) died *suddenly*, on the 25th of July last, [1824]; possessed of personal property to the amount, in value, of about 25,000*l.*

In April 1815, the deceased duly made and executed his will, in the presence of three witnesses, and thereof appointed his wife, and three other persons, executors. *affidavits*; where it is doubtful whether any *proof* of what appears of their history, as stated in the affidavits, would justify the Court in pronouncing *for* those alterations, if regularly *pounded*, as parts of the testator's will.



By this will he bequeathed to his wife the sum of 1000*l.*, and all his furniture, &c., absolutely ; and a life interest in the sum of 8000*l.* : to his nephew, John Rolls, 500*l.* : to a person named Francis Sard, 50*l.* : and the residue (with the exception of certain other legacies, amounting in the whole to about 2000*l.*) to his nephews and nieces, children of his brothers' and sisters,' twenty-three in number ; eight of which residuary legatees were still minors.

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In the month of April, 1822, the deceased, in a conversation with Mr. John Sard, mentioned to him, that it was his intention to leave *Francis* Sard 100*l.*

In December, 1823, or January, 1824, he produced his will to Mrs. Rolls, intimating his intention to make certain alterations in the same. He then read over the will to Mrs. Rolls ; and, on reading the legacy of 500*l.* given to his nephew, John Rolls, made *some* alteration therein with a pencil. On reading the bequest of 50*l.* to Francis Sard, he made a similar alteration ; observing, that he had promised Mr. John Sard, to leave Francis Sard 100*l.* ; the propriety of keeping which promise, she, Mrs. Rolls, assented to. On reading the bequest of 8000*l.* for life, to Mrs. Rolls, he observed, that " he had not done sufficient for her," and that " he would leave her something more, increasing her income to 500*l.* per annum ;" upon which, still with a pencil, he made a further alteration in the said will.

The will remained in the testator's own possession ; and it was found, after his death, in his iron chest, by a Mrs. Holt, with the following *pencil* marks, and alterations. The legacies to Mr. John Rolls, and Mr. Francis Sard, increased, the one from 500*l.* to 1000*l.* ; and the other, from 50*l.* to 100*l.*, respectively, by

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*figures*—and the bequest for life to Mrs. Rolls, increased from 8000*l.*, to 9000*l.*, by the word, “*nine*,” (substituted for *eight* in the will) all in pencil—such figures and word, respectively, being in the deceased’s hand-writing.

An affidavit of these facts was now exhibited, made by Mrs. Rolls, Mrs. Holt, Mr. John Sard, and a Mr. Saddington, (the latter to the hand-writing only) and a decree was prayed, on the part of the executors, calling upon the residuary legatees, to shew cause why probate of the said will, *with* the said pencil alterations, should not be granted to the executors in common form ; with the usual intimation.

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Sir JOHN NICHOLL.

These alterations are slightly made, and are, clearly, in themselves, and upon the face of them, only cursory and deliberative. And it is by no means certain, that any *proof* even of what appears of their history in these affidavits, would justify the Court in pronouncing for them, if regularly propounded, as parts of the deceased’s will. With this impression of the case, I think, that probate of the will, *as altered*, ought *not* to *pass* to the executors, in common form ; and, consequently, that the citation now prayed, is one that ought not to issue. A probate in common form would, of course, not be binding upon the parties entitled to the residue ; especially not, upon such of them as are minors. At the same time, in permitting it to pass, the Court might well mislead *all* the parties as to what its probable judgment would be, in the event of these alterations being propounded ; and the facts and circumstances, now stated, merely upon affidavits, for the purpose of

sustaining them, being pleaded, and *proved*—a possible mis-conception against which, I think, I am bound to guard by rejecting the present prayer. In the event of these alterations not being propounded by those who are interested to sustain them, and proved, *per testes*; probate must be taken of the will, as originally executed (a).

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Motion refused.

(a) These alterations were propounded in the following Hilary Term, in an allegation, pleading, in substance, as stated in the above affidavits: but the Court, on debate, rejected the allegation, and decreed a probate of the will, to the executors, in its original state.

TELFORD v. MORISON, formerly THOMAS.

2d Session.

(On Motion.)

**THIS** was a question of *objection* to an act on petition, which the proctor for the party objecting had declined *writing to*; simply *moving* the Court, by counsel, that his party might be *dismissed*, under the following circumstances.

Amy Thomas, widow and executrix of John Thomas, the party deceased in the cause, had been cited by John Telford, a creditor of the said deceased, to exhibit an inventory of his effects, and to render a true and correct inventory, though he may not go on to examine witnesses to falsify the inventory.

The court is, plainly, not *merely ministerial* in the matter of inventories, under the statute of Hen. VIII., although there are two cases, in *prohibition*, in the Court of King's Bench, seemingly to the effect (one, at least, of them) *as reported*, that it is so, *merely ministerial*. Accordingly it will go on to entertain objections to inventories as above, until it is more fully assured, that the *advised* judgment of the Court of King's Bench is, to the effect of those cases, *as reported*.

A creditor (or legatee) may object to an inventory given in by an executor or administrator; and may file an allegation pleading *omissa*, in order to take the answers of the executor or administrator.

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just account of her administration of the same. A proctor appeared for the party cited; and, after exhibiting a declaration (instead of an inventory) together with an account, as required, prayed that his party might be dismissed. The proctor for the creditor prayed to be heard, on his petition, in objection to this; and brought in *an act on petition*; alleging, in objection, that she, the executrix, in her declaration, had not “set forth the *particulars* of the sundry spirituous liquors, of which she admitted the deceased” (a publican by trade) “to have died possessed;” nor had she “set forth, and specified, the several articles of household goods, furniture, plate, linen, and china, belonging to the deceased; nor when, where, and by whom, the same were appraised;” but had merely stated, generally, that “they *were* appraised at the sum of 120*l.* 10*s.*” And the same in respect to the lease and good-will of the testator’s house and business, which were only said, generally again, to have been “appraised at the sum of 100*l.*”; though they were objected to be of much greater value. The act therefore prayed, *that* the executrix might be compelled to amend her declaration in these particulars; and might, further, be condemned in the costs of the proceeding. Instead of writing to this act, the proctor for the executrix, as already said, *moved* the Court, by counsel, that his party might be dismissed—submitting, *that* the Court had no jurisdiction to entertain objections of this, or any nature, to an inventory, on the authority of two cases determined in prohibition by the Court of King’s Bench; the case of *Catchside v. Ovington*, reported in 3 Burrows, and that of *Henderson v. French*,

reported in 5 Maule and Selwyn (*a*), and, consequently, that his party, the executrix, was entitled to her dismissal.

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This is a question of jurisdiction; and it is one which should have been raised, by the proctor for the executrix writing to the act, to the effect of what is now submitted to the Court, by counsel, on a mere motion. At the same time, as both the Court and the adverse counsel were previously apprized of the grounds of the motion, so that neither the one, nor the other, are taken by surprize in consequence of the course actually pursued, I shall proceed to dispose of the question, at once, notwithstanding the general irregularity of the proceeding: although, as I repeat, this is not the mode in which a question of jurisdiction at all, especially one of this magnitude, ought to have been raised.

The jurisdiction of the Court, in the case in point, is denied, not so much, *avowedly*, upon any reason, or with reference to any principle, as it is upon the authority of two cases determined in prohibition, that of Catchside *v.* Ovington, and that of Henderson *v.* French, the latter itself, by the way, founded, partly no doubt, on the former, which must be taken to have had at least *some* weight with the Court, in its character of *precedent*, as, and for, which, it was cited in the latter case. In a third case, indeed that of Hinton and Parker (*b*), there is a *dictum* to a similar effect with the judgments in the other two, *so far as that dictum itself goes*. But the *principle* upon which that *dictum* pro-

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(*a*) 3 Burr. 1922, 5 M. and S. 406.

(*b*) 8 Mod. 168.

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ceeded, be it what it might (for it is not *said*, nor is very easy to be *conjectured*), at least gives no countenance whatever to the *avowed* principle upon which the other two cases were *decided*. For, in that case of Hinton and Parker, the power of the Ecclesiastical Court to entertain objections to an inventory, in one of the *only* two cases in which it has any pretence to exercise such a power, namely, at the suit of a *legatee*, is admitted: a prohibition is actually denied on the ground of its having such power. The *dictum*, a mere *dictum*, is only to this effect—that the Ecclesiastical Court has no such power, at the suit of a *creditor*. But the principle upon which the prohibition seems to have gone in the case of Catchside and Ovington and the other—(a) namely that, under the statute of Hen. VIII., the Ecclesiastical Court is merely ministerial in this matter of inventories—goes to deprive the Ecclesiastical Court of the power of entertaining objections to an inventory altogether; whether at the suit of a creditor, or at that of a legatee, as will presently appear.

It is much to be regretted, that the Ecclesiastical Court should be prohibited in any matter wherein jurisdiction has *long* been conceded to it, until (without offence be it spoken) the Court applied to for the prohibition has been attended by *civilians*, in order to its

(a) In the case of Catchside and Ovington, however, *that* the prohibition went upon the construction of the statute of Hen. VIII., [21 Hen. VIII. c. 5. § 4] as making the Ecclesiastical Court merely ministerial, is a statement which rests, not on the authority of the report itself, but on that of the editor of the edition in 1790, who so says, in a note on the report. All which the report itself says, is this —“By Lord Mansfield and the Court:—It appears, *on the face of the proceedings*, that the Spiritual Court hath no jurisdiction.” But what the *proceedings* had been does not appear from the report.

being fully instructed as to *all* the points raised by the application. The very circumstance of jurisdiction having been long conceded to it, in any case, implies, that its jurisdiction, in that case, is well founded, and of public convenience—and before the further exercise, at least, of *such* a jurisdiction, is prohibited to the Spiritual Court, it should, perhaps, be heard, by its own counsel, in its defence; as better apprized of those matters more immediately appertaining to the peculiar law, and ancient practice of the Spiritual Court, which the application to the Temporal Court for a prohibition in that case almost necessarily involves, than counsel, who practise in the Temporal Courts *only*, can well be supposed to be. Now in the cases relied on in the present instance, against the jurisdiction of the Ecclesiastical Court, the prohibition seems to have gone, without *much* discussion of any sort: and it certainly went, without the Court of King's Bench, at the hearing of either, having been attended by civilians, that I am able to discover. But the Ecclesiastical Court in those cases, was prohibited in a matter, wherein, as will presently be shewn, jurisdiction *had* long been conceded to it: and that the exercise of its jurisdiction, in that matter, *was* of public convenience, can hardly be questioned. It is of *great* convenience to creditors and legatees, (for the same considerations apply to both) to obtain a *constat* of assets, before they engage, here or elsewhere, in perhaps, expensive litigations for the recovery of debts or legacies. A disclosure of assets, the executor or administrator is bound to, also, by his very oath of office. But all this is merely nugatory, if an executor, or administrator, can evade a disclosure of assets, by

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any paper exhibited here, which he chuses to call an inventory—which must however be, if this Court is merely ministerial in this matter of inventories, and can entertain no objections, of any sort, to an inventory as now contended. Of whom, but persons studious of concealment, are inventories usually sought, through the intervention of these Courts? But if these Courts are *functi officio*, the instant that any thing in the name of an inventory is exhibited, as to any benefit that, in nine cases out of ten, can be reasonably expected to result from them, this matter of exhibiting inventories might well be abolished, altogether.

The Court of King's Bench, in issuing its prohibition in the cases referred to, seems to have taken up this matter, as if both the obligation of exhibiting an inventory, and the jurisdiction of these Courts over inventories, originated with, and rested solely upon, the statute of Henry VIII. This at least is to be inferred from the printed reports, both of the arguments, and, especially, of the judgments in those cases. In that of *Henderson v. French*, which is reported most at length of the two, it appears, indeed, that the present Mr. Justice Littledale, who was then counsel, did state, in shewing cause against the rule, *nisi*, for a prohibition, that it had been the practice of the Court sought to be prohibited (the Consistory Court of Carlisle) to permit exceptions to be taken to inventories, time out of mind: and entries of such proceedings in that court, from the year 1636 to 1812, were produced in support of that statement—the earliest, however, of these, that in 1636, it is observable, being long subsequent to the statute of Hen. VIII. But the counsel who argued in support of the rule, Mr. Scarlett, with-



out any *apparent* reference to all this, as wholly beside the question, was content, by way of answer, with a mere reference to, and argument upon, the statute of Hen. VIII. In the words of the report "Scarlett contra cited 21 Hen. VIII. c. 5, § 4, which he contended only requires an executor to make an inventory, and to deliver it into the keeping of the bishop, or ordinary." And the Court *seems* to have taken the same *limited* view of the case in its judgment: for "the Court were of opinion (the *words* of the report again) that as the *statute* directed the executor, for the security of the creditors and legatees, to make an inventory to the bishop, or ordinary; and that no bishop or ordinary should, *under pain of 10l.*, refuse to take such inventory, his office, was merely *ministerial*"—adding, "if the statute had intended more, it would have so said."

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But whoever is acquainted with the old law, and practice, of these Courts must be aware, that neither inventories themselves, nor the jurisdiction of these Courts over inventories, is at all to be traced up, or ascribed, to the statute of Hen. VIII. Lyndewood, for instance, who wrote long before the statute, may be cited in proof of this; who, in the 13th title of his third book *de testamentis*, enters, pretty fully, into the matter of inventories, and shews them to have been, at *that time, generally*, under the cognizance of the Spiritual Court. Nor does it seem to have been long, *suspected* even, that the jurisdiction of these Courts, in this particular, was *abridged* by the statute of Hen. VIII. This may be collected from Swinburn, in whose book it appears, that inventories and accounts were still required *by* these Courts, of executors and administrators, at the suits of those interested in the effects of testators, or

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parties dead intestate; and might be questioned *in* these Courts—notwithstanding this, and long subsequent to, the statute of Hen. VIII., when Swinborne wrote. There are several sections, in the sixth part of his book, setting out *when* the inventory is to be made, *what* is to be put in it, and the effect and benefit of it—and it is there, expressly, also said, that “if any creditor, or legatory, do affirm that the testator had any more goods than be comprised in the inventory, he must prove the same: *otherwise*, the judge (the ecclesiastical judge) is to give credit to the inventory”—clearly not making him merely *ministerial* in this matter, and so, unable to entertain objections of any sort, to an inventory.

The object of the statute which is supposed to have *this* effect, (I mean that of *making* these Courts merely ministerial) is so declared in its title, and runs so much through its enactments, as hardly to be mistaken. The title is, “What fees ought to be taken for probate of testaments:” And the preamble, as clearly, shews the true, I might almost say, the sole, object of the statute to have been, the restriction of fees. The order respecting inventories occurs (incidentally, as it were) in the middle of a section (the 4th § of the act) which, after stating how much the ordinary shall take in particular cases, of wills or intestacies, goes on to enact, “*that* the executor, or in case of an intestacy, the administrator, calling or taking to him such person, or persons, two at the least, to whom the deceased was indebted, or had made any legacy, and upon their refusal, or absence, two other honest persons, being next of kin to the deceased, and in their default or absence, two other honest persons, shall, in their presence, and by their directions, make, or cause to be made, a true and

perfect inventory of all the goods, chattels, wares, merchandises, as well moveable, as not moveable, whatsoever, that were of the said deceased; and the same shall cause to be indented; whereof the one part shall be by the said executor or administrator, upon his oath, to be taken before the ordinary, &c. on the holy Evangelists, (*averred*) to be good and true; and the same one part indented, shall deliver into the keeping of the said ordinary, &c., the other part thereof, to remain with the said executor or administrator; and that no ordinary, &c., upon the pain in this estatute, hereafter contained, refuse to take any such inventory to him presented, or tendered, to be delivered, as is aforesaid."

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Now it is pretty evident, that this part of the act neither does, nor was intended to, *confer* any jurisdiction on the Ecclesiastical Court, with respect to inventories. As little can it be construed to have taken any away. What it does is this: it regulates the mode of making inventories; as, especially, that the inventory shall be made in duplicate, one part to be kept by the ordinary: and, in effect (as taken in conjunction with the whole act, and the inception of this fourth section) prescribes, that the ordinary shall receive that one part so committed to his keeping, without exacting additional fees—which last I take to be what the legislature had *principally* in view, in that part of the order respecting the *receiving* of inventories by the Ecclesiastical Court, itself. Nor is there in this fourth section, as might be inferred from the printed report of the case of *Henderson v. French*, in *Maule and Selwyn*, any *special* penalty of 10*l.*, imposed on the ordinary, for a contravention of the statute in the matter of inventories; from

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which penalty imposed, the Court of King's Bench seems, *partly*, to have inferred, that the ordinary's office was so, *merely*, ministerial in that matter. That penalty, a *general* penalty, is imposed by a subsequent *general* section (the 7th) which enacts, that "every ordinary, &c., that shall do, or attempt, or cause any thing to be done, or attempted, against this act or ordinance (the whole statute, that is) *in any thing*, shall forfeit and lose, for every time so offending, to the party grieved in that behalf, *so much money as he shall take contrary to the present act* ;" (still with reference, this, to the main object of the act, as explained above, and a further proof of such being the main object) "and over that, shall lose and forfeit 10*l.* sterling—a moiety to the king, and the other moiety to the party grieved in that behalf, that will sue, &c., for recovery of the same." And, as to any jurisdiction which the Ecclesiastical Court, then-tofore, had over inventories not being taken away by this fourth section, this is put beyond all manner of doubt, by another general (the 8th) section, which is in these words ; "provided always, that this present act shall not be prejudicial to any ordinary, or any other person which now have or hereafter shall have authority for probate of testaments ; but that every of them shall, and may, convent before them, all, and every person or persons, made and named executor, or executors, of any testament, to the intent to refuse, or prove, the testament, or testaments, of that testator, or testators ; and to *bring in inventories, and to do every other thing concerning the same*, as they might do before the making of the act."

Here then the jurisdiction is not only not taken away from, it is expressly reserved to, the ordinary.

The restraining of fees is the great object of the act; the limiting the jurisdiction of these Courts is not its object at all. The act neither originated the obligation of exhibiting inventories; nor did it, in my humble judgment, render the Spiritual Court merely ministerial, concerning inventories—confine it, that is, to the *mere* receiving of inventories, when exhibited. On the contrary, it reserved to it all the powers in this matter, which it had before the act; of which powers, that of examining alleged omissions in inventories indisputably was one.

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If, however, the Court of King's Bench had put a different construction upon the statute, having all these matters fully before it, it would have been the duty of this Court to have acquiesced in that construction, to say the least, in its *public* capacity. The Court, therefore, in that case, would, undoubtedly, prohibit itself, by admitting the validity of the present objection. But I am not disposed to do this, as the matter *now* stands—and the rather, as I find, that my predecessor did not conceive that *his* hands were tied up in a case *like* the present, by the decision of the Court of King's Bench, in the case of Catchside and Ovington; the principal case, that is, on the authority of which it is contended, that it is incompetent to the Court to proceed in the present case. This may be collected, for instance, from the case of Shackleton *v.* Lord Barrymore, which occurred here, in Hilary Term, 1798; and which, in substance, was as follows.

It was a suit by Shackleton, a creditor, against Lord Barrymore, as administrator of his brother, the late lord, for an inventory. Lord Barrymore exhibited an inventory. The creditor then gave in an allegation,

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pleading *omissa*; to which allegation, not only his lordship's answers were taken, but the creditor being dissatisfied with those answers, produced witnesses on the allegation who were examined to *falsify* the inventory. At the hearing of the cause, Lord Barrymore's counsel, of whom I was one, took an objection, at least, to the depositions being read; citing, among other arguments in support of the objection, this case of *Catchside and Ovington*. The judge, Sir William Wynne, upon mature deliberation, sustained the objection, so far as it went to the reading of the depositions; at the same time that, notwithstanding the case of *Catchside and Ovington*, he ordered a fuller inventory as with reference to assets, the omission of which was deducible from the answers. From a note which I took of his judgment, at the time, I find that learned person to have expressed himself to the following effect:

"It has been argued, that a creditor, not being allowed to object to an account, it is not open to him, on the same principle, to object to an inventory. Upon principle, perhaps, there is no very solid distinction between the two cases; but a distinction has always prevailed in practice; allegations in objection to *inventories* have constantly been admitted. Two cases have been cited, indeed, to the effect, that the common law will not *allow inventories* to be objected to in these Courts; but the reports of those cases are so short, that it is not easy to see upon what principle they proceeded. In the one of these, the case of *Hinton and Parker*, it is merely *said*, that the Spiritual Court shall not falsify an inventory at the suit of a *creditor*, though it may at the suit of a *legatee*. This is strictly, all; for it is neither

said, *how* the Spiritual Court shall not proceed to falsify an inventory at the suit of a creditor; nor is any ground for the distinction between the case of a creditor, and that of a legatee, in this matter, for which there seems to be no good foundation in reason or principle, attempted to be laid. In Catchside and Ovington, the Court said—"On the face of the proceedings, the Ecclesiastical Court had no jurisdiction;" but what the proceedings had been in that cause, does not appear from the printed report.

¶ What has been principally contended, however, is, that though the Court may allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation; yet, that it should go no further: that it should not permit witnesses to be examined upon the allegation, in order to *falsify* the inventory. This distinction I take to be well founded (and therefore I incline to sustain the objection, so far) for the following reason: If the answers confess more assets than were inserted in the inventory, the Court may order the inventory to be amended, by the insertion of these. But what is it to do if further assets are established, by *witnesses*, in *opposition* to the answers? It cannot order them to be inserted in the inventory, *without* the party's oath; for the inventory is required, by the statute, to be *upon* oath. Nor can it compel the executor or administrator to swear to assets, the possession of which he has, twice already, upon oath, denied. Hence, I sustain the objection taken to the depositions being read, in this case. Nor in the cases cited, (or in any other, that I am aware of) of depositions taken on allegations of this

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sort (a), does any one occur, in which the Court has ordered articles to be added to an inventory, on depositions *against* answers: so that the taking of such depositions, at all, should appear merely superfluous. //

Here, then, in this case of *Shackleton v. Lord Barrymore*, there is a direct precedent for the Courts proceeding in this matter, notwithstanding the case of *Catchside and Ovington*: and I think, that, on the authority of that case, the Court may proceed in the present; notwithstanding the countenance which that case of *Catchside and Ovington* derives from the more recent case of *French and Henderson*; and notwithstanding that more recent case itself, taken substantively. Further, in the present case, the party, an executrix, whose authority is derived *from* the ordinary, objecting a statute in bar of proceedings *by* the ordinary, is, at least, it should seem, first bound, herself, to a compliance with that statute. Has she complied with the statute? Is this such an inventory as is required by the statute? It is certainly not, in my view of it. The executrix does not even style it an inventory, but a declaration in lieu of an inventory. She classes the effects in masses, and does not detail them, specifically—nor does she set forth by whom they were appraised—both, seemingly, required by the statute. Upon all these considerations, I think that the executrix must either write to this act, or bring in a further inventory, as prayed by the creditor.

Motion refused.

(a) *Armstrong v. Caley*, 1763. *Venables v. Watkins*, 1766. *Deane v. Crevis*, 1767. *Griffiths v. Craven*, 1771.



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In the goods of ROBERT NICHOLSON, Esq.  
deceased.

3d Session.

(On Motion.)

**I**N the month of October, 1821, probate of four paper writings, as containing the will, and three codicils, of Robert Nicholson, the party deceased in the cause, was granted to his three executors. The testator died possessed of large personal and heritable property, both in this country, and in Scotland; and, amongst other property in Scotland, of a certain heritable bond, dated the 2nd of January, 1812, granted to him by Patrick Crawford Bruce, Esq. upon the lands and barony of Glenelg, in North Britain, for securing the sum of 15000*l.* with lawful interest thereon.

The paper writing, of which probate was granted as a *third* codicil to the testator's will, contained an assignment of 10,000*l.*, part of the 15,000*l.*, so secured by the said bond, in favour of Robert Nicholson Bruce (son of the aforesaid Patrick Crawford Bruce) his heirs, and assigns; and in no way related to, or affected, any property of the testator in this country; and it was absolutely necessary, in order to carry the same into effect, that the said original third codicil itself, (termed in Scotland a deed of *disposition*, or *assignation*) should be recorded in the register books of the council and sessions at Edinburgh.

An affidavit verifying the above facts, and circumstances, was now exhibited; and the Court was *moved*, by counsel, (with reference, especially to a case in

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1796, *re* Macpherson, deceased, where a similar application was acceded to) to decree, *that* the said original third codicil to the will of the said testator should be delivered out of the registry of the court (an authentic copy of the same being first taken, and deposited in its room) for the purpose of being inserted in the register books of council and sessions, kept at Edinburgh, by the Lord Chief Registrar of Scotland, or his deputies; and there finally deposited.

The COURT,

Granted the prayer, as made; but directed, that means should be taken to ensure a certificate of the due delivery of the said original codicil to the said Lord Chief Registrar, or his deputies, and of its having actually been inserted, recorded, and deposited as aforesaid—(a precaution which should seem not to have been taken in the former case of Macpherson, so that no proof was ever exhibited in that case that the instrument had actually been duly received and registered.) And the said codicil was, subsequently, delivered out, accordingly, to the executors, on their entering, with two sureties, into a bond, in the penal sum of 1000*l.*, *conditioned* to their exhibiting a certificate as above, by the first session of the ensuing (Hilary) Term; or, at least, an affidavit to the same effect, duly sworn, in the event of the said Lord Chief Registrar, or his deputies, refusing, or declining, to grant such certificate.

Motion granted.

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In the goods of the Rev. WILLIAM PHILLIPS,  
deceased.

3d Session.

(On Motion.)

**I**N the month of October, 1817, letters of administration, with the will and two codicils annexed, *de bonis non*, &c., of the Rev. William Philips, deceased, had been granted by the authority of this Court, to three of his younger children; being, as such, three of the substituted residuary legatees named in the said will. They had been granted, in the first instance, to his widow, (since also deceased) as residuary legatee for life.

A defect in the legal representation of a party, occasioned by the lunacy of one, of his several administrators how permitted by the Court to be supplied.

In the month of March 1824, a commission in the nature of a writ *de lunatico inquirendo* was duly awarded by, and issued from, the Court of Chancery, under which, one of the said three administrators was found to be a lunatic; and two persons were subsequently appointed by the Lord Chancellor, committees, severally, of his person and estate.

There were still standing, in the name of the deceased, in the books of the governor and company of the bank of England, certain sums, the property of the said deceased; but of which neither the interest could be received, nor the principal stock transferred, as directed by the will, in consequence of such lunacy of one of the said three administrators; whereby the letters of administration, granted as aforesaid, had become inoperative in law. (a).

(a) The act of 36, George III. c. 90, entitled "an act for the relief of persons equitably and beneficially entitled in the several stocks, and

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Under these circumstances, duly verified by affidavit.

The COURT,

Was pleased, on motion of counsel, to direct that, upon the letters of administration so granted as aforesaid, being brought in by the two (the sane) administrators, and the committees of the third, letters of administration, *de bonis non*, &c., should, with the leave, and by consent, of the said committees, issue *de novo* to the two former only; with the omission of the latter, the third administrator, who had so become a lunatic as aforesaid. (*b.*)

Motion granted.

annuities, transferrable at the bank of England," so far as it relates to lunatics, was considered to apply only to stock, standing in the name of a lunatic, either in his own right, or as a trustee—and not to stock, standing in the name of a deceased person, whose legal representative had become lunatic.

(*b.*) Where a sole executor, or administrator, becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee, for his use and benefit, during his lunacy. But, until the present, no case of an application to the Court to supply a defect in the legal representation of a party deceased, occasioned by the lunacy of one of his several administrators, is believed to have occurred.

3d Session.

BROGDEN *v.* BROWN.

(*On the Admission of an Allegation.*)

An allegation  
in objection  
to an inven-  
tory brought  
in, on oath,

MARY JONES died on the 13th of June 1823, a widow, and without a child—leaving John Brown, by a party in the cause, admitted; and “answers” decreed. *Quere*, whether the Court might not assign a “term probatory,” and permit witnesses to be examined on such an allegation, in the event of the answers being unsatisfactory.

party in the cause, her natural and lawful father, and the only person entitled to her personal estate and effects, if dead intestate, Mr. Brogden, the other party, was sole executor in a will of the deceased, purporting to bear date on the 12th of June 1823: he had propounded this will, and it was opposed by the father.

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Both parties pleaded, and examined witnesses—and on the second session of Trinity Term, [1824,] publication was decreed, at the petition of the proctor for Brown, and “for sentence on the first assignation next Court:” when the proctor for Brogden asserted an allegation, on admission of which the judge assigned to hear on the fourth session.

On the second session, however, of the term preceding [Easter Term,] the proctor for Brogden, had brought in an inventory of the effects of the deceased, on the oath of his party, (a) in compliance with an assignation to that effect. And the proctor for Brown, on the second session of Trinity Term before mentioned, objected to that inventory, and the judge assigned to hear “on his *petition*,” in objection to it, next Court.

The above assignation was continued from the third, to the fourth session, when both proctors declared that they should give no further allegation, unless exceptive to the testimony of witnesses: on admission thereof, if

(a) It should be said, that Mr. Brogden had been *sworn* executor of the will which he was now propounding, ten days after the death of the deceased—and that, as executor, in that interval, he had intermeddled with the deceased's effects, by converting property, &c.—though a *probate* of the will had been prevented from issuing by a caveat entered, in the name of the father, after he had been so sworn; and the subsequent institution of the present suit. See case of “Brogden v. Brown,” among the cases heard in *Hilary Term*, post.

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any, on the By-day—to which By-day, the rest of the assignation was also continued; and so, regularly, on, till Michaelmas Term; on the first session of which, the proctor for Brown waived his *petition*, and brought in an *allegation*, in objection to the inventory; which allegation was *opposed*, and now stood, *on* admission.

1. 2. This allegation, after pleading (articles one and two) in substance, that Brogden took possession of the effects of the deceased—that he was assigned to exhibit an inventory, and that he had omitted various articles in the inventory actually exhibited, pleaded, in substance, more specifically.

3. That the business of the deceased, that of a bread and biscuit baker, was carried on for some time after her death, and until the same could be disposed of—that, during such time, there were goods sold to the amount or value of 59*l.*, or thereabouts, which sum had been paid into the hands of Brogden, the exhibitant—but that he, Brogden, in the inventory exhibited, had charged himself with the sum of 21*l.* 14*s.* 6*d.* only, in respect of goods so sold.

4. That the deceased, at the time of her death, had book debts owing to her, amounting, altogether, to the sum of 300*l.*: and was also possessed of two bills of exchange, (value unknown)—that Brogden had received the said book debts, wholly, or in part, and the said bills of exchange—but had charged himself with neither, in the said inventory exhibited.

5. That the said deceased was possessed, at the time of her death, of a policy of assurance, effected on her own life, for 500*l.*, or some other considerable sum—that Brogden, since her death, had received the amount of such policy, under assignment thereof, or otherwise;

but had not charged himself with the same, nor made any mention thereof whatever, in the said inventory. Lastly,

6. 7. That the deceased was possessed of various articles of plate, furniture, and wearing apparel, (in part specified) also taken possession of by Brogden (over and above what he had mentioned and set forth in his inventory): with which, or with any sum or sums of money in respect of which, he, Brogden, had, likewise, omitted to charge himself, as bound by law.

The ADMISSION of this allegation, was OPPOSED on the behalf of the *executor*—partly, as with reference to the *late* period at which it was tendered; and to the delay in the hearing of the principal cause, now ripe for the hearing, which the assigning of a new term probatory, inferred to be consequent on the admission of the allegation, would, of course, give rise to. It was, also, again submitted, as *a circumstance*, (*a*) on the authority of *Henderson v. French*, and other cases, that the Ecclesiastical Court had been held by the Court of King's Bench, merely ministerial in this matter of inventories—and, so, not authorized to proceed, by allegations admitted, or otherwise, to falsify inventories once given in on the oaths of executors.

#### JUDGMENT.

Sir JOHN NICHOLL.

Mr. Brogden, as sole *executor* of a will, which, in that character, he is propounding before the Court, was assigned to exhibit a full, true, and perfect inven-

(a) See this objection fully disposed of in the case of *Telford v. Morison* formerly *Thomas*, *ante* page 319. The executor was here, also, *party in the cause*—[See note (b) p. 40 post.] and the objection was not taken by a creditor or legatee, but by the other party.

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tory, of all and singular, the goods, chattels, and credits, of the deceased, which had come to his hands, possession, or knowledge, at any time since her death. It is evident that he has not complied with this assignation, if the averments of the allegation are true. The Court has been told that he is a *nude* executor—(a) that, however, is a circumstance in the case, quite immaterial. He is equally compellable to make a full disclosure of the effects, to the other party. Brown, the other party, is therefore equally entitled to specify omissions, and suppressions, so, *at least*, as to have his answers, in detail, as if the executor was benefited to the whole extent of the property, by the asserted will. It may be material too, that this full disclosure should be had, in the course of the cause. The effects in the mean time may be made away with—an administration, *pendente lite*, may even be necessary to secure these—it may turn out to be highly proper, and for many reasons, that the Court should postpone its judgment in the principal cause, till the disclosure sought is, first, fully had.

I admit the allegation, and decree answers. Whether the Court shall proceed to the ulterior step of assigning a term probatory, in order to let in witnesses upon the allegation, is another consideration. (b) So it also is

(a) The will propounded, bequeathed the whole of the deceased's property, except a few trifling legacies to Mr. Brogden; but in *trust* for the benefit of her father, John Brown, for life; and of her brother and sister, Edward Brown, and Ann M'Greggor, in equal proportions, at *his* death.

(b) It may be inferred from the case of *Telford v. Thomas*, [*ante*] that the Court would not permit depositions to be taken on an allegation given in by a creditor, or legatee, in objection to an inventory exhibited



(for I would be understood by no means to have finally decided,) whether this collateral matter should, or should not, delay the hearing of the principal cause. I have strong doubts whether it should; in the event of its not being made to appear that it has a material bearing on the principal cause; so that it requires to be definitively settled, in order to enable the Court to pronounce safely in this. But should Brogden delay giving his answers *in order to bring the principal cause to a hearing, before these are brought in*—this, of itself, would induce the Court, to pause; and, possibly, to insist on the answers *being* brought in, before the cause is set down for hearing,

On the matter of costs, if the averments of the allegation should turn out to be unfounded, Mr. Brogden will be entitled to the costs of this collateral proceeding,

by an executor, cited to exhibit an inventory in that character, *merely*. [See for what reasons, in page 331 *ante*] But Mr. Brogden had not only been sworn executor, and would so finally be, in the event of the will being pronounced for; he was, also, the party before the Court propounding the will; and the allegation in objection to the inventory was not given in by a creditor or legatee, but by the other party, the party opposing the will. This, obviously, subjects the case to very different considerations; so that the Court *might* well have permitted depositions to have been taken on this allegation, had the answers proved unsatisfactory, without, at all, departing from the principle laid down in that other case of *Telford v. Thomas*. No such step, indeed, was actually taken in the present case, for the following reason. The answers had were *most* satisfactory—and, at the hearing of the principal cause which followed, the conduct, throughout, of the executor, which had been grievously aspersed, throughout, *in the name* of the other litigant, was not merely vindicated from those aspersions; but was proved to have been exemplary, and generous in no ordinary degree. [See cases in Hilary Term, post.

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whatever becomes of the principal cause. And so, on the other hand, will Brown be, whatever becomes of the principal cause, if the charges of omission or suppression made in the allegation are fully sustained. Should the allegation, again, be only partly sustained—should the omissions proved, turn out to be, either immaterial, or accidental merely, or, in a word, not to be wilful and corrupt, the costs of the present proceeding, in this state of facts, will be *purely* discretionary; and the Court will allot or apportion them, in that event, to the best of its judgment, and not without reference to *all* the circumstances of the case.

Allegation admitted, and answers decreed.

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4th Session.      CRESSWELL and others *v.* CRESSWELL and others.

(*On Motion.*)

In no case will the Court decree administration to substituted trustees, as such, without the consent of all parties beneficially interested in the trust properties, until the trust properties are actually vested in such substituted trustees.

**ESTCOURT CRESSWELL** Esq., late of Pinkney Park, in the county of Wilts., died on the 5th of July, 1823, possessed of real, and personal, estate, of a very considerable amount in value—having first made and executed his last will and testament, bearing date the 21st day of February 1821, whereof he appointed Joseph Pitt, Esq., and the Rev. Charles Dewell, clerk, executors, and residuary legatees *in trust*, and six of his, the testator's, sons residuary legatees—with direction that, in case his said trustees, or either of them, should die, or refuse, or decline, to act, or become incapable of acting, in the trusts of his said will, his said sons, or the major part of them, might appoint others in their

stead, in the *usual* manner in which trustees are appointed in similar cases.

Shortly after the death of the said testator, the said trustees signified their refusal to act, and declined acting, altogether, in the trusts of the said will—and, subsequently, renounced, by a special proxy under their hands and seals exhibited in this Court, as well the probate and execution of the said will, as their right and title to letters of administration, of all and singular the effects of the deceased, with the said will annexed.

In the month of August, 1823, one of the sons of the deceased filed a bill in the high Court of Chancery, in behalf of himself, and the several creditors, legatees, and next of kin, of the deceased, generally, against *all* the other parties before mentioned, for the purpose of having the trusts of the said will carried into execution, under the authority of the said Court; praying that it might be referred to one of the masters of the said Court to appoint a trustee, or trustees, in the room, and stead, of the said Joseph Pitt, and Charles Dewell; as, also, for the appointment of a receiver; and for an injunction to restrain the defendants (or either of them) in the interim, from receiving, or possessing themselves of, any part of the testator's real or personal estate.

On the 13th of the same month of August, the Lord Chancellor was pleased to grant the injunction; as also to appoint a receiver, till further order—(an order and appointment still in force)—and was, also, further pleased on the 13th of December, 1823, to order or direct that it should be referred to a master (Mr. Dowdeswell) to appoint proper persons to be trustees under the will of the said testator, instead of the defendants, Pitt and Dewell: and that they, the said

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last-mentioned defendants, should convey and assign all the several trust premises to the trustees, so to be appointed, to, for, and upon, the several trusts contained in the will of the testator concerning the same, or such of them as were still subsisting, and capable of taking effect, by a deed or deeds of conveyance and assignment, to be settled, and approved of, by the said master.

In pursuance of the said order, the master, to wit, on the 7th of April, 1824, *reported*, that he had approved of the appointment of Richard Hopkins Harrison and Francis Henry Thomas, Esqrs., as trustees of the real and personal estate and effects of the testator; as also, that he had settled, or approved of, deeds of conveyance, and assignment, to *vest* in them the several trust premises. But the said report was still *unconfirmed* by the Lord Chancellor; nor had the conveyance, and assignment, therein referred to, been executed, so as to *vest* the several trust premises in the trustees, so approved of by the master, by reason, as alleged, of one of the executors and trustees in this will, namely, Mr. Pitt, *refusing* to execute the same.

Under these circumstances it was prayed, on behalf of the said Richard Hopkins Harrison, and Francis Henry Thomas, by, and with, the *special* consent and approval of three of the six residuary legatees, that administration (with the will annexed) of the goods of the deceased might be granted to them, the said Richard Hopkins Harrison, and Francis Henry Thomas, under the usual security—as the trustees, specially so appointed by the High Court of Chancery, of the estate and effects of the deceased, in the place and stead of Joseph Pitt and the Rev. Charles Dewell, the execu-

tors, and residuary legatees in trust, named in his will. 1824.

In order to found the application, it was principally alleged in the act of Court, duly verified by affidavits, on the part of the *applicants*, that a considerable part of the testator's property consisted of a leasehold estate of great value, held of the see of Gloucester, in want of *immediate* renewal, as depending on a single life; by reason of which, and other special circumstances, also stated in the act, great loss and detriment to the estate were daily accruing; and still greater, probably, would accrue, in failure of the speedy appointment of a personal representative of the deceased.

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In reply to this it was alleged, on behalf of the *opposing parties*, namely, the three other residuary legatees, that it was incompetent to the Court, by law, and the practice of the Court, to grant the administration, *at this time*, as prayed, *against* their sense and consent. And it was further alleged, that a consent on their part to a grant of administration to Messrs. Harrison and Thomas, *jointly*, was only withheld, in consideration, that, neither the master's report had been confirmed by the Lord Chancellor, nor had the conveyance, therein specified, been actually executed, so as to *vest*, in those gentlemen, the trust premises.

The single topic urged by counsel IN SUPPORT of the prayer of the petition was, the loss and detriment, actual and probable, accruing, and to accrue to the estate, for want of an immediate personal representative of the deceased. The counsel for the OBJECTORS submitted, that these must be, at least in great part, obviated by the circumstance of there being an existing *receiver* to the estate—and brought to its view the difficulties which might probably arise from the Courts

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decreeing the grant to pass to the proposed administrators, *before* the trust estates should have become actually *vested* in them, by virtue of the assignment directed by the Lord Chancellor. Suppose, it was said, that circumstances (of which there are some disclosed in the act on petition itself, that render this no very improbable supposition) should occasion any variation in the order of reference to the master, or any pause, even, as to the propriety of confirming the master's report. The Court might be placed in a situation of great difficulty, by acting, precipitately, on the master's report, in either of those events.

COURT.

With every possible disposition to afford the parties all the assistance in its power with respect to the management of this large estate, it is still, I think, incompetent to the Court to accede to the present application. Two gentlemen, unobjected to, and therefore, I presume, very proper in themselves, to take the administration, are nominated trustees by the master, under an order of reference, made by the Lord Chancellor, which *also* directs, that the trust premises shall be conveyed, and assigned, to them, by the original trustees, so named in the will. But the deeds to that effect, as approved by the master, are still unexecuted—consequently, the trusts are still not vested in the new trustees—a previous step which I take to be absolutely necessary, to entitle them, *as of right*, to the administration. It is alleged that Mr. Pitt, one of the original trustees, refuses, or declines, to execute the deeds of assignment, upon the ground of the testator's *insanity* at the time of executing this latter will; and of there being a former will in existence, of a different import.

This may, as suggested, (appearing, as it does, in his answers in Chancery, given in *subsequent* to the order) occasion a variation *in* the order of reference to the master. But without entering into this consideration, (or into that other, whether this be, or be not, *such* a "report" as requires to be confirmed by the Lord Chancellor (*a*), in order to its *full* validity) I am of opinion, for the reasons already assigned, that this application is premature, and that I am bound to reject it. In no case of such substituted trustees would the Court be justified in decreeing administration to them, without the consent of all parties beneficially entitled to the trust property, until the trusts are actually vested.

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#### Motion refused (*b*).

(*a*) It had been said, in argument, that it was not the practice of the Court of Chancery to confirm such reports—and that the master's "report," in this case, was one that required no confirmation.

(*b*) But on the caveat day following, administration was decreed, jointly, to Mr. Harrison and Mr. Thomas; the deeds of conveyance and assignment being then certified to have been executed by Mr. Pitt and Mr. Dewell, the original trustees.

On this caveat day, the deeds so executed by the old trustees, were stated to have been executed by one only, Mr. Harrison, of the new trustees; there being two parties to these deeds, the old, and the new trustees, as settled by the master. The Court directed the grant not to *pass*, till the actual execution of the deeds by Mr. Thomas, the other trustee; who was said, as accounting for the delay, to be resident at Hereford, but to be perfectly willing and ready to execute them.

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HOWELL v. METCALFE and SANDERS.

4th Sesaion.

Where securities are required to justify in ordinary course, the Court will not dispense with this, even partially, but under very special circumstances.

If the Court decrees a general grant, but, under special circumstances, requires the securities to justify only as to a part of the property—it will not allow *separate* bonds; so that *other* securities than those who *justify* in the requisite amount, shall enter into the common administration bond, in the double amount of the whole property.

**SIR THEOPHILUS JOHN METCALFE**, (the party deceased) died in the month of August, 1822, having, a short time before his decease, stated that “ he had left his will in China,” but without saying, who were his executors, or to whom he had bequeathed his property. The deceased had been resident many years in China, and came to this country in 1820, for the benefit of his health, meaning to return to China.

Under these circumstances, administration, *limited to certain purposes*, of the goods of the deceased, *until his will, or an authentic copy thereof, should be transmitted to this country*, (or his *intestacy* be ascertained) was decreed to two persons, Edmund Larken, and William Monson, Esqrs., by this (the Prerogative) Court, in the month of December, 1822 (*a*), which administration had ceased and determined some time back; a copy of the said will having actually been forwarded to this country.

The deceased, by his said will, appointed his brother (now Sir Charles Theophilus Metcalfe) of Hydrabad, Charles Magniac, and George Sanders, Esqrs., both of Canton, and the said Edmund Larken, Esq., his executors—and his daughter Eliza Metcalfe, a minor, aged about sixteen years at the time of his death, residuary legatee.

In March, 1823, a bill was filed in the high Court of Chancery, wherein the said minor, by David Howell,

(a) See vol. 1, p. 343, 345.



(party in the cause) was plaintiff, and the said Edmund Larken and William Monson, were defendants—and, by an order made in the said cause, Mr. Howell was appointed guardian of the person and property of the minor, until she attained her age of twenty-one years.

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In the month of March, 1824, letters of administration (with the said copy of the will annexed) of the goods of the deceased, were granted, by authority of this Court, to the said David Howell, limited to the purpose only of transferring all sums of money, due and payable to the deceased, from the governor and company of the bank of England, from the London dock company, from the company of merchants trading to the East Indies, and from the globe insurance company, respectively (*a*), into the name of the accountant general of the Court of Chancery. But,

This last administration had also since ceased and determined, viz. on the arrival of Mr. Magniac, one of the executors, in this country. Mr. Magniac, however, subsequently died here; but without having taken upon himself the probate, or having, in any manner, interfered in the trusts, of the said will: and of the other executors, two were still in India, and the third, Mr. Larken, had renounced the probate and execution of the will.

Under these circumstances, a decree had been extracted at the instance of the said David Howell, Esq., calling upon the executors in India, to accept, or refuse, probate of the copy of the said will aforesaid,—otherwise to shew cause why letters of administration (with

(*a*) See vol. 1, p. 343.

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such copy annexed) of the goods of the deceased, should not be committed and granted to the said David Howell, Esq. as the guardian of the said Eliza Metcalfe, and for her use and benefit—limited *until* she should attain her age of twenty-one; or, until the original will and codicil should be transmitted to this country; or, *until* the arrival here of the said executors, both, or either of them.

That decree was now returned into Court, duly executed by a service on one of the pillars of the Royal Exchange, &c.—and no appearance being given, and the facts, as above stated, being duly verified by exhibits, and affidavits, the Court was moved—in the first instance, to decree administration according to the tenor of the said decree—but, in the event either of its declining so to do, *or of its requiring, in that case, that the securities should justify*—then, to decree letters of administration to the said David Howell, Esq., limited for the purpose only of “receiving and collecting the outstanding personal estate and effects of the deceased; and from time to time, when so received, of investing the same in the name of the accountant general of the Court of Chancery; and further, for the purpose of duly administering the estate and effects of the deceased, according to the trusts of his said will, by and under the directions of the said high Court of Chancery.”

The COURT,

As not thinking itself authorised to dispense with the securities, *justifying*, in the event of its decreeing administration according to the tenor of the decree, was pleased to decree letters of administration, &c. to

Mr. Howell, *limited*, as prayed in the other alternative, on his exhibiting an inventory, and giving the usual security. (a)

Motion granted.

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(a) The administration so decreed, was not however extracted in consequence of a caveat entered on behalf of certain parties interested under the will of a third party (Mr Pattie, see p. 53, *ante*) of whom the deceased, whilst living, was one of the acting executors; to compel Mr. Howell to take a *general* grant, to which he was *entitled*, instead of the *limited* one so decreed, on the principle of the inconvenience which would accrue to them from such *limited* grant, in prosecuting any claims which they might have against the estate of the deceased, as executor of Mr. Pattie. Mr. Howell, on this, abandoned the *limited* grant, and agreed to take a *general* grant, provided the Court would dispense with the securities justifying, save as to the property, (said to amount to about 10,000*l.*) *not* in the hands of the accountant general of the Court of Chancery. And on the first session of Hilary Term, 1825, a motion to the Court to that effect, was *granted*. A still further difficulty however afterwards occurred, in consequence of the sureties produced by Mr. Howell, who were willing to *justify* to the amount of the property *out* of the Court of Chancery, (the 10,000*l.*) refusing to subject themselves to the *usual* penalty, under the *common bond*, in the requisite amount, viz.—in the amount of 140,000*l.*, the deceased's *whole* personal estate being valued at between 60, and 70,000*l.*: and the Court, on the By-day after Hilary Term, was thereupon further prayed, either to dispense with sureties, altogether, as to the property in the name of the accountant general; or, that separate bonds might be allowed, so that *other* sureties than those *justifying*, might enter into the *common bond*. The Court, however, declined acceding to either of these prayers, as in direct violation, either, of its ordinary practice—observing “that it had gone *as far as it could*, for the accommodation of the parties.” Upon this, the grant seems to have been altogether abandoned.

Mr. Howell, however, as *prochein amy* of the minor, Miss Metcalf, had filed a bill in Chancery against two of the surviving executors of the will of the deceased: and proceedings in that suit were stayed, by their being no legal representative of the deceased, to be made a party to the

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4th Session.

## TUCKER v. WESTGARTH and others.

*(On Petition.)*

Where it is discretionary in the Court to grant administration to either of two claimants, it always decrees it, *ceteris paribus*, to that claimant who has the *greater* interest in the effects to be administered.

**THIS** was a question between two claimants, as to a grant of administration *not* within the statute, 21 Henry VIII. c. 5. It was determined by the Court, as such questions *usually* will be, in favour of that claimant, whose interest in the estate to be administered proved to be greatest.

## JUDGMENT.

Sir JOHN NICHOLL.

Thomas Atkinson, the party deceased, died in the year 1804, having made his will, of which he appointed his then wife, Mary Atkinson, executrix, during widowhood. By this will he bequeathed *the principal part* of his property to his widow, for her life; and, after her death, to his daughter, Isabella—and upon the death of this last, without children, he bequeathed it over to his nephews and nieces, the children of his three sisters. The *residue* of the testator's property was undisposed of by his will.

The widow took probate of the will, but married again, leaving goods unadministered; and died. Her (second) husband is since also dead—and Thomas

suit. Accordingly, on the first session of Easter Term, 1825, the Court on this statement, duly verified, was *moved* (and was pleased) to decree letters of administration, of the goods, &c. of the deceased, to a nominee of Mr. Howell, "limited to the purpose only of answering to the said suit, in the Court of Chancery:" which limited administration was afterwards extracted.

Tucker, party in the cause, is an executor in, and has taken probate of *both* their wills. He, Tucker, then, is the representative of the widow's interest, indeed, in the effects of Thomas Atkinson, the first testator; but not of Thomas Atkinson, the first testator himself; of whose unadministered effects he now claims administration, with his will annexed.

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The other claimants, and other *parties* in the cause, are five persons, nephews and nieces of the testator, children of his three sisters, and whose interest, as substituted legatees in his will, has actually accrued by the death of the daughter, Isabella, subsequent to that of the mother, without issue. They are also the daughter's first cousins, and next of kin.

None of the claimants were next of kin to the deceased *at the time of his death*. Consequently, this administration, not being within the statute, is one upon which the Court must exercise its own discretion. In the exercise of which discretion, it generally looks to which of the claimants has the greater interest, and decrees the administration accordingly—though other considerations may, undoubtedly, concur.

In the present case, upon every consideration, the next of kin of the daughter, and not the representative of the wife, have the superior title to the administration. They have a greater interest in the undisposed of residue—they are substituted legatees in the will—add to which, that the original testator never intended his wife to *continue* his personal representative after a re-marriage; a circumstance which throws some little additional weight into the scale.

I decree administration, as prayed, to the next of kin of the daughter: but, as their *affidavits* contain some

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imputations on the other party, not founded upon any thing which appears in their "*act*," I think that, upon this consideration *only*, they are not entitled to *full* costs. Hence I shall condemn Mr. Tucker in 10*l.*, *nomine expensarum*; and not in *full* costs, as I should, otherwise, have done; thinking his opposition to the present grant, utterly unfounded.

4th Session.

MONTEFIORE v. MONTEFIORE and others.

(*On the Admission of an Allegation.*)

An allegation, propounding an imperfect paper, rejected; as insufficient, if true, to sustain the paper propounded.

In what sense, and to what extent, the Court assumes an allegation to be true, in considering whether it be admissible.

The difference, what, between a mere *unexecuted* testamentary paper, and a testamentary paper which is

also *imperfect*, in other respects. The legal *presumption* is *against* the validity of either: but it is infinitely stronger, and more difficult to be repelled, against the validity of an imperfect paper of the latter, than it is against that of an imperfect paper of the former, description. What it is which the Court requires, to repel the legal presumption against a paper of either description.

**THIS** was a cause or business of proving, in solemn form of law, the last will and testament of Abraham Montefiore, deceased—promoted by Henrietta Montefiore, the relict, and the sole residuary legatee named in the said last will, of the deceased, against the three executors of a former will. The admissibility of the allegation propounding this last will had been debated on a preceding Court day; and was the question that now stood for sentence.

JUDGMENT.

Sir JOHN NICHOLL.

This suit is brought, in a spirit of perfect amity between the parties, for the purpose of taking the opinion of the Court upon the validity of a testamen-

tary paper, propounded as the will of Abraham Montefiore, deceased. I have taken time enough to the matter maturely; both as the property at stake is very large; and, as the Court has received an intimation, *that* the parties are disposed, in this instance, to *abide* by its decision, be that decision what it may. I have therefore, again, in the interval between this, and the last, Court day, carefully considered all the circumstances of the case: but my opinion with respect to it has never wavered; or been different from that which I originally entertained.

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The cause, at present, stands merely, *upon* the admission of the allegation propounding the paper: but should the Court *reject* that allegation, there is an end of the cause itself. For the principle upon which the Court rejects *any* allegation is, its inadequacy (assuming its *truth*) to make out the case laid in it. If the Court then *rejects* this allegation, it must be, that it thinks it insufficient, assuming it to be true, to sustain the paper which it propounds, *as a will*: so that, in that event, as already said, there is, of course, an end of the cause. The cause must proceed, indeed, should the Court admit the allegation, in order to this being *proved*: as it only assumes an allegation to be *true*, for the purpose of determining whether it be *admissible*—its final avail, and efficacy, in the cause, obviously depending upon whether, and to what extent, the allegation is *proved*, after being so admitted.

In assuming, however, an allegation to be true for the purpose of determining its admissibility, the Court only assumes to be true those facts pleaded in it, capable of satisfactory proof; and not, by any means, all the several averments which may stand in the allega-

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tion; which, in effect, are mere inferences deduced, somehow or other, from those facts. The averments in a plea are to be taken for true, so far only, as the facts pleaded justify inferences to the effect of those averments; which whether they do, at all, and if so, to what extent, it is for the Court to determine. For instance, in this sort of allegation, "intention," on the testator's part, to do so, and so, is always *averred*—but such averment goes for nothing, unless the Court can infer, that the testator's intention *was*, as averred, from the facts pleaded. So when again, in a plea of this same description, the testator's *capacity* at the time of doing the testamentary act is averred, as it always is; the truth of that averment is only assumed by the Court, even in deciding upon the admissibility of the plea, to what extent it thinks that the facts and circumstances of the transaction, as pleaded, warrant an inference that he *was* of capacity at such time; and so, in other matters.

Having premised these observations, it becomes proper to consider the paper propounded itself—both with respect to its *form*, and with respect to its *effect* or *substance*. Upon the result of these considerations, the legal presumptions in, and the whole view to be taken of, the case very much depend.

Upon the face of the paper it is, in point of *form*, a very imperfect paper. It is neither written by the deceased himself; nor signed; nor dated: no executor is appointed in it: it has no formal, or other, words of conclusion: two letters appear written, 'as beginning a new sentence; and with these it, abruptly, terminates. A paper more imperfect, *in point of form*, can hardly be imagined.

*See 111  
411-2-66*



The term "imperfect" as applied to an instrument of this description, is carefully to be distinguished from the word "unexecuted." Not every "*imperfect*" paper is "*unexecuted*": nor is every "*unexecuted*" paper "*imperfect*," except only in a certain sense of that term.

For instance, a testamentary paper may be finished, and complete, looking to the body of the instrument, as purporting to dispose of the testator's *whole* property, and so on—still, however, if unexecuted, as, for instance, by wanting the deceased's *signature*, it is, in a certain sense of the word, though in a certain sense of the word only, an *imperfect* paper. But in applying the term, imperfect, to the present paper, the Court means, that it is imperfect, in *every* sense of the word: it is one, that on the face of it was, manifestly in progress only; it is unfinished and incomplete, as to the *body* of the instrument, as well as "*unexecuted*"; all which the paper itself propounded, which is in these words, clearly implies.

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"I leave my son, Joseph Montefiore, Worth Park Farm—And my son Nathaniel, Brighton Farm—And all my other property I leave and bequeath to my dear wife Henrietta Montefiore—This is my last will and testament. I w——"

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The legal principles as to imperfect testamentary papers, of *every* description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually *executed* by the testator; and so executed, as it is to be inferred, on the face of

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the paper, that the testator *meant* to execute it. But if the paper be complete in all *other* respects, that presumption is slight, and feeble, and one, comparatively easily repelled. For *intentions, sub modo* at least, need not be *proved*, in the case: that is, the Court will *presume* the testator's intentions to be as expressed in *such* a paper, on its being satisfactorily shewn, that its not being executed may be justly ascribed to some *other* cause; and not to any *abandonment* of those intentions, so expressed, on his, the testator's part. But where a paper is unfinished, as well as unexecuted, (especially where it is just begun, and contains only a few, clauses, or bequests) not only must its being unfinished, and unexecuted, be accounted for, as above; but it must also be *proved* (for the Court will not *presume* it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be *clearly made to appear*, upon a just view of *all* the facts and circumstances of the case, that the deceased had come to a *final* resolution in respect to it, *as far as it goes*: so that, by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart, or defeat, the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle *such* a paper to probate, in any case, in my judgment.

Upon these principles it follows that, against the instrument set up in the present case, from its very *form*, the presumption of law to be repelled is a strong presumption. The task of repelling it—the *onus probandi*,—in the case of this, as of every, imperfect paper, rests, it need scarcely be observed, upon the party setting it up.

In its *effect*, this instrument has peculiar features which render the task so imposed on the party who propounds it, a pretty difficult one. It not only sets out with devising real property in a different course from that in which it would descend by law ; (and so far, it is clear, that it *can* have no operation) but it disposes at once, of the whole personal property ; giving it all (above four hundred thousand pounds) to the widow ; and excluding all the testator's children (who in legal succession would be entitled to two thirds) from any part of it. Legal presumption, as well as rational probability, are strong *against* the testator having finally conceived any such intention.

There are two modes, nearly opposite, in each of which however, testamentary instruments are, not uncommonly, drawn up : the one (perhaps the most common of the two) is, to give, at the outset, the several legacies ; and, at the conclusion, to dispose of the residue : the other is, in the first instance to bequeath the whole property ; and, subsequently, to except out of it the several legacies, &c. which the testator may chuse to bequeath, as deductions from that whole. Now in the present instance, all the personalty being given to the wife, at the outset, in exclusion of the children, unless the Court can be *satisfied* that, so far as relates to the disposition of the personalty, this paper is complete, and that it was the testator's full and final intention to subject that personalty to *no* deductions whatever, either in favour of his children, or other, it would be impossible, I think, consistently with the ordinary principles acted upon by this Court, or with common sense, and common justice, to establish this paper as the deceased's will. If the instrument is, (as it clearly

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is) in legal construction, one in *progress*, merely, and unfinished as to the *body* of the instrument, the legal presumption, surely, is, that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot assent to the proposition contended for by one of the counsel, that, if a testator dies while the instrument is in progress, that instrument, "*so far as it goes*," be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate, in the case of every unfinished paper is this: can the Court infer that by pronouncing for it, it will carry into effect what it collects, from *all* the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it—but surely not, if it sees reason to believe that, by so doing, it will defeat, or counteract, instead of giving effect to, that wish.

Hitherto the Court has been considering this paper taken singly, and not in connection with any *other* testamentary papers left by the testator. Such, however, there are—papers before the Court. There is a former executed will; of which this unfinished paper, if established, will be, in effect, not a partial, but a total, revocation: for the two are not such that the Court can pronounce for them, as it sometimes can pronounce for papers in parallel cases, as "*together containing*" the will of the testator. It has been said that, at all events, the deceased intended to die testate; *and* that he intended to revoke his former will; and the Court has been urged from this, to pronounce for the unfinished

paper. Testate the deceased must die—for if the paper propounded be invalid, the executed will must operate. And, as to the revocation of the former will; the question is not so much whether the deceased can be taken to have intended to revoke his former will, simply, as it is, whether he can be taken to have intended, that *this* unfinished, paper, should be substituted for, and should operate in lieu of, and in preference to, that former will. The question is not a question between the former will, and an intestacy—it is between the two instruments; between the former will, and this paper, in its obviously incomplete, imperfect state. The former will being an executed instrument the “*præsumptio juris, et de jure*,” is, that he intended it to operate, unless he actually cancelled, or destroyed it, or made another valid instrument, which will have the effect of revoking it.

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Before proceeding to a consideration of the facts pleaded in this allegation, I will make one other *general* observation, applicable to questions of this nature, (not unimportant, too, in its bearing upon the *particular* case), which is this. In considering whether a plea of this description be admissible, the Court is bound to keep in view the extent, and effect, of the paper which it propounds—and to couple these, all along, with its history, as given in the plea. Now what this part of its duty suggests to the Court, as with reference to the present immediate question, is this. The paper propounded going, in effect, to revoke an executed will, and to put an immense property in a course of distribution which is very far from being an “*officious*” one; the allegation, to be admissible, must make out a case of *full* and *entire* “*capacity*” in the testator, at the

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time when the paper was framed. Nor will it be sufficient, in order to this, for the plea to make out, that he was of capacity, to answer a few (common) questions, or to make a few (casual) remarks, or even to conceive and express some (loose) wishes and ideas, as to altering his will, and so on—it must satisfy the Court that he was equal, and alive to, and comprehended the *full* import of what he was doing at the time; seriously important as what he actually did, must be admitted to be: in short, as Lord Coke expresses it, that he was “capable, at the time of the transaction, of making disposition of his ‘*estate*,’ with judgment and understanding.” And in determining whether the allegation should, or should not, satisfy the Court in this particular, it must look, not to mere averments, but to the facts pleaded—such averments, as already said, being good only so far as they are warranted *by* the facts pleaded; which last are all of the allegation that the Court assumes to be true.

I now then proceed, subject to these general considerations, to consider the facts of this case as they are stated in the present plea: and they appear to me to raise a question of so little doubt and difficulty, that it is principally for the satisfaction of the parties that I am induced to enter into a detailed statement of them.

The allegation, in the two first articles, furnishes, in substance, a history of the testator, and of his *executed* will. It pleads that Abraham Montefiore died on the 25th of August last, [1824], at Lyons, in France, on his way home to this country, leaving a widow, one daughter by a first wife, and two sons and two daughters by a second wife (his now widow and relict)

all minors, and the youngest daughter born after May, 1820, the date of the executed will. This will, with two codicils, is all in the deceased's hand writing ; and it is to the following effect. It is a complete will as to personality—it is a will that, obviously, was not *intended* to act upon real property ; as it makes no mention of such, and is attested by a single witness : the necessary inference from which, is, that the testator meant that his real estate should descend to his eldest son. Of his personality it disposes as follows—25,000*l.* to each of his children, except to the daughter by his first wife, whom it bequeaths only 15,000*l.*, as the testator had settled about 10,000*l.* on her, previous to his second marriage. The residue, with the exception of certain legacies, of no very large amount, it bequeaths to the widow ; whom it appoints (jointly with four other persons,) executrix. What the residue might amount to *at that time*, does not appear.

This will as I have described it, remains uncanceled, and unrevoked, unless it be revoked by the paper now in question. It does appear, however, that the deceased, at an intermediate time, (pleaded, in the latter end of 1822, or at the beginning of 1823) *intending* (so pleaded) to make a new will, wrote certain papers which are before the Court, marked D. E. and F. They contain a mere outline, or rough sketch, of a new will ; they are loosely written, and with various erasures ; trustees were, apparently, intended to be, but none are, appointed, and the residue is undisposed of, in either of them. Previous to writing these papers, however, I should observe, namely, in August 1822, the deceased is pleaded to have invested stock, of the value of about 10,000*l.* sterling, in the names of each of his four

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younger children—placing them, therefore, upon an equality in this respect with the eldest, the daughter by the first wife. It is also pleaded, that he had a child born in February, 1823, which died shortly afterwards. These papers, D. E. and F., themselves, were laid aside, and abandoned, so far as appears: and *they* are not suggested even to be of any legal validity.

It may not, however, be improper to consider, whether the disposition contemplated by the deceased at that time, as appears from those papers, raises any thing of a probability in favour of the *present* disposition. In my opinion it does quite the reverse. It appears from these, that the testator's intention then, at least was, not to give every thing to his wife absolutely, and to consider his children provided for by what he had secured to them in his life time, but, to limit his wife to a certain income for life; and to leave at her death a certain sum only (100,000*l.*, three per cents) at her disposal. And as the testator had not proceeded in the draft will, contained in papers D. E. and F., so far as to a disposition of the residue, it is almost necessarily to be inferred, *that* the residue of his property was intended by the testator to be given among his children.

These different instruments then, and the previous history, though rendering it highly probable, that the deceased would alter his will of 1820, *generally*, yet lay no foundation of probability in favour of the particular disposition, (purported to be carried into effect by means of the paper now propounded), of the whole personalty to the widow.

It is further to be observed, that no previous testamentary *declarations* are suggested to have been made by



the deceased, tending to support the probability of any intended alteration of his will. He is pleaded to have been, long, *in a declining state*: yet no dissatisfaction with his existing will appears to have been expressed by him at any time, in confidence to his friends, or otherwise; still less is any thing of an intention, in the event of his making a new will, to bequeath the whole of his vast personal property to his wife, absolutely. Nothing, indeed, of a testamentary character, so far as appears, was either said or done by the deceased, from the time of his writing those loose papers in the beginning of 1823, which have already been spoken of, until within a very few hours of his death.

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This brings me then to a consideration of the circumstances pleaded in the fifth article of this allegation, upon which *alone*, the validity of the instrument propounded, if to be supported, must rest. It seems proper that the Court should read this fifth article in order to render the observations that it may have to make on the history contained in it fully intelligible.

[Here the judge read the fifth article of the allegation; (a) and partly in the course, and partly at the conclusion of the reading, observed to the following effect.]

(a) The fifth article of the allegation was in the following words: —  
 “ That the said deceased being on his return to this country, as in the  
 “ first article of this allegation is pleaded, and having been for many  
 “ months previous in a declining state of health, became, on the night of  
 “ the twenty-fourth day of August last, considerably worse, and about  
 “ eight o’clock in the evening of the said day, about five hours preceding  
 “ his death, fully sensible of his danger, he addressed himself to Louis  
 “ Mazzara, a person who accompanied the said deceased on his journey,

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The deceased is here then pleaded, (as already said) to have been, for many months previous, in a declining state of health: and to have become "considerably worse," on the night of the 24th of August—and then

"and said, 'Mazzara, you must promise me, that my body shall be transported to London after my death: that thereupon, the said Louis Mazzara promised the said deceased, that his directions should be complied with; that the said deceased then said, 'I wish something to be given to *poor William: this young man is very clever*, and it may assist him,' meaning, and intending thereby, William Woodley, his, the deceased's servant; and he, the said deceased, spoke of giving the said William Woodley one thousand pounds, but gave no further directions as to the same, but enquired of the said Henrietta Montefiore, his wife, what the said William Woodley received per annum: that shortly after the premises just before pleaded, a physician, who was to pass the night with the said deceased, arrived, and almost immediately after

Martins, another physician also visited the said deceased: that the said deceased thereupon called to him the said Martins the physician, and the aforesaid Louis Mazzara, and taking them both by the hands, addressed them in the French language, to the following purport and effect.—*'My friends, I take you for witnesses, that I made about four years ago'*—that the said deceased then stopped, and asked the said Louis Mazzara, what the word 'will' was in French: that the said Louis Mazzara informed him, that it was expressed by the word 'testament;' that the said deceased then said, 'yes, yes,' 'testament,' 'four years ago I made a will,' and addressing himself to the said

Martin, said 'yes, I made a will, but I do not wish it any longer, I do away with it, and I wish to make another.' And the party proponent doth further allege and propound, that by the aforesaid expressions, he, the said deceased, meant and referred to the paper writing, being the will, bearing date the third day of May, 1820, more particularly pleaded and referred to, in the second article of this allegation, and that, by the expressions he then used he, the deceased, meant to declare his intention to revoke the said will: that the said deceased then continued. "I leave to my son Joseph, the farm at Worth Park; and to my son Nathaniel, the farm at Brighton: that the said deceased was pro-

it is, at eight o'clock in the evening, within five hours of his dissolution, that this transaction *commences*. Now it is highly probable, I think, *a priori*, on the face of this statement, that his capacity *was* impaired, and that

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"ceeding further to express his intentions with respect to the disposition  
"of his property, when he was interrupted by the said Martins,  
"who observed, that it would be better to write down all that the said  
"deceased dictated: that the said deceased thereupon replied, Mr.  
"Martin is right; Mazzara, take paper and write down that. That the  
"said Louis Mazzara having accordingly procured paper, and set him-  
"self to write, in the presence and hearing of the said two physicians,  
"and William Woodley desired the said deceased to repeat what he  
"had before said respecting his two sons: that the said bequests were  
"written down by the said Louis Mazzara in French, in the very words  
"and being the very paper marked B.; that the same was then read  
"over by the said deceased himself, who, after having considered it for  
"a short time, directed the said William Woodley to write it in English.  
"That the said deceased then dictated to the said William Woodley,  
"and pursuant to such dictation, the said William Woodley wrote in  
"English the very words contained in the testamentary paper marked  
"C., brought into, and left in the registry of this Court for safe custody,  
"on the part and behalf of the said Moses Montefiore, and now an-  
"nexed to the affidavit of the said Moses Montefiore, and pleaded and  
"propounded on the part and behalf of the said Henrietta Montefiore,  
"except the word, '*this is my last will and testament*;' which were  
"added by the said William Woodley, of his own accord, under the  
"circumstances hereinafter mentioned: that after the said William  
"Woodley had written the said paper, save and except the words; '*this  
"is my last will and testament*;' the said deceased had prayers read,  
"and after the prayers were over, the said William Woodley, under the  
"impression, that the said deceased had nothing more to add to the  
"last mentioned paper, wrote the words, '*this is my last will and tes-  
"tament*.' That the said William Woodley then read over the whole  
"of what he had so written, audibly and distinctly to the said deceased,  
"who approved thereof, and then desired to be raised up in bed: that  
"the said deceased was accordingly raised up in bed, and on the said  
"paper writing being placed before him, he made an attempt to take a  
"pen, and to write something on the said paper himself: but from his

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his mind *was* wandering, even at the *commencement* of this transaction; a considerable time was occupied in its progress; and the deceased is admitted to have been *in extremis*, before its actual termination. He begins with, not any expressed wish concerning the disposition of his property, but with a desire, that his body, after his death, should be conveyed to England. Nor even after this, does he advert to any intention of altering his will—but merely to “doing something” for a servant, who was in attendance on him, and whom he talks of

“great bodily weakness, and a convulsive seizure, he was incapable of so doing; that the said deceased then requested to have some wine, which having taken, he desired that the paper so written by *William Woodley* should be again read over to him, which being accordingly done, he again asked for the pen, but the said deceased becoming more and more exhausted, and being, from continued convulsions, quite incapable of writing, he appeared to wish to say something, and uttered in English, the word ‘and,’ or ‘*I wish*’; but at that very moment he was seized with a violent spasm, which affected the organ of speech, that he uttered several French and English words, the whole purport of which, could not be comprehended by the persons who surrounded his death bed, but which evidently had reference to the paper written as hereinbefore pleaded by the said *William Woodley*, and which together with the pen, he repeatedly (after he had become speechless) made signs to have brought near to him: that the attention of the said deceased, was entirely fixed to the said paper, and to the last moment of his life, he shewed signs of wishing to do something to it. And the party proponent doth allege and propound, that the said *Abraham Montefiore* the deceased, was at, and during all and singular the premises, of perfect, sound, and disposing mind, memory, and understanding, and talked and discoursed rationally and sensibly, well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of giving instructions for his last will and testament; although from bodily weakness, he was incapable of fully executing the same. And this was, and is true, &c.”

leaving 1000*l*. A physician, who is to pass the night with him, arrives, and soon after, a second physician—when the deceased, then for the first time (taking one of these, and his friend, Mr. Mazzara, by the hand) alludes to his former will, and says, “that he does not wish it to stand, &c.” Now, that some wandering notion to that effect came across his mind at this time, must be conceded; but that the deceased can be taken, from this part of the history, to have proceeded like a person, in the full possession of his understanding, setting about making a new will, I am not at all disposed to admit. The deceased then begins expressing his wishes, “I leave my son Joseph, Worth Park farm, &c.,” but it is not the deceased who proposes that such, his wishes, shall be committed to writing—that is suggested by Martins, one of the physicians. The deceased, however, assents; and, directing Mazzara to procure a pen and ink, and take them down in writing, repeats his wishes as to the Worth Park and Brighton farms to Mazzara, in the French language, which he understood so imperfectly, as even to be at a loss for the French word for a testament or will. Mazzara takes down, in French, these purported devises of the Worth Park and Brighton farms; which the deceased, after reading over, directs his servant, Woodley, to write down in English (a). The French paper is abandoned upon this—and Woodley writes the paper in question, from the deceased’s

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(a) The paper so written by Mr. Mazzara was before the Court; and was in these words:

“Les derniers volontiers de M. Abraham Montefiore ont été de  
“laisser la ferme de Worth Park, a Joseph.—A Nathaniel, Brighton  
“ferme, et.”—

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dictation—purporting to devise the real estates as above; and giving the personal property to his wife. Prayers are then read to the deceased, at whose suggestion does not very clearly appear from the plea—at the conclusion of which *he*, Woodley, *thinking* the deceased had nothing more to add, writes the words “This is my last will and testament.” now appearing at the foot of the paper. The instrument itself is then read over to the deceased, who attempts to get up and sign it; but is prevented from so doing by a convulsive seizure—attempts to sign, that is, this imperfect paper; which it is hardly possible to suppose that *the deceased*, if he had had *any* degree of capacity at the time, could have *thought* that he had arrived at the conclusion of—being, as it is, without any provision for his children; without any legacy whatever, even to Woodley, although his intention to “do something” for Woodley seems to have first drawn his attention to the subject of his will; and without any appointment of either executors or trustees. And as to the writer of the paper, so far was *he* from thinking it *concluded*, (although he *had* thought so, and under that impression *had* written the words “this is my last will”) that he begins a new clause; he writes the letter “I”; and a “w”, the initial letter of the word “wish”—but he can make out nothing *as* to the wish of the deceased—who becomes, in effect, speechless at that time, though he still attempts to articulate, and soon after actually expires.

Now, looking at all the circumstances here stated, I am, in the first place, by no means satisfied, that the deceased was of *full* capacity, during any part of this transaction—or that the whole is not rather to be ascribed to the vague wanderings of a mind that had

survived its disposing powers, than to one in the full exercise of thought, judgment, and reflection. In the second place, I am by no means satisfied that, assuming, for argument's sake, the deceased's full mental capacity, at the inception, and even during the whole, progress of this testamentary act, it had arrived at maturity, *as far as it goes*: I am by no means satisfied that it was *not* (I much more incline to think that it *was*) his intention, having bequeathed the whole of the personalty to his wife, in the first instance, to make, out of it, provisions for his children, and, probably, other deductions; in manner as, I have said, is not uncommon with testators. But if such *were* his intention, to pronounce for this paper would be to defeat, and not to carry it into effect—the paper itself purporting to bequeath the whole property (the personalty) to his wife, absolutely. What the deceased's *precise* testamentary views may have been, I can only conjecture—he might, probably, have meant some distinction in favour of his second son: he might, probably, have meant to place his youngest daughter, who was born after the date of the executed will (which will must operate in the event of the Court pronouncing, in effect, against the paper now propounded by rejecting this allegation) upon an equal footing with her elder sisters. The Court, indeed, has no power of carrying these testamentary intentions of the deceased, if such they were, into *full* effect—the widow, however, *may*, if so disposed, as she is the residuary legatee under the executed will—and that the residue is so large in amount as to put this amply within her power, admits of no question.

The Court being of opinion that all the circumstances

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pleaded in the allegation will not be sufficient, if proved to sustain the paper propounded, rejects the allegation.

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CONSISTORY COURT OF LONDON.

1st Session.

MONTAGUE v. MONTAGUE.

(On Motion.)

In a cause of divorce, where the alleged marriage is denied to be valid, the Court may, *probably*, permit third parties, who have estates expectant, *inter alia*, upon the issue of such alleged marriage being illegitimate; and, who, consequently, are interested in the question of its validity; to be cited to "*see proceedings*" in the cause, so far as relates to the marriage.

**THIS** was a cause of divorce, instituted by the wife against the husband, by reason of adultery.

In the libel, as on this day brought in, on the part of the wife, the marriage of the parties at Gretna Green, according to the laws of Scotland, was very especially pleaded (a)—and the prayer of the libel, in the first instance, was, that it might be pronounced a good and valid marriage, agreeably to the laws and customs of Scotland, in order to *found* the sentence of separation *further* prayed in the libel.

The husband was now *said* to be tenant for life of large real estates; entailed, or limited, under the will of an uncle—first to his own issue, male; and on failure of such issue, male, (as, also, in the then further event, of his not disposing of the said estates, either by deed or will) secondly, to his two sisters, Miss E. A. W. Montague, and a Mrs. Crawford. The parties to the marriage pleaded, were also said to have issue living, three children.

Under these circumstances, it was submitted, that, as the sisters had an expectant estate on the children

(a) See the next case, *post*.



of the marriage pleaded being *illegitimate*, they had an interest in the validity, or invalidity, of the alleged marriage. It was therefore prayed, (principally it should seem, in *anticipation* that the husband's possible defence might be a *denial* of the marriage) that the sisters should be cited to "*see proceedings*" in the cause, *so far as related to the marriage, pleaded to have been had between the parties.*

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IN SUPPORT of the motion, the counsel for the wife principally relied on the precedent in the case of *Chichester v. Donegal (a)*; which, they maintained, was a case not to be distinguished from the present, in point of general principle. They also contended that, as no objection was raised, or was meant to be, on behalf of the parties proposed to be cited by the one party principal, the wife; it was scarcely competent to the other party principal, the alleged husband, to be *heard*, in objection to the issue of a decree of the nature of that now prayed.

On the CONTRARY, it was insisted, on the part of the husband, that the application, notwithstanding the alleged precedent, was actually unprecedented—that of *Donégál v. Donegal (b)* being a suit of "nullity of marriage;" in which suit the marriage is the principal, or rather the *sole*, point at issue; whilst, in a suit like the present, the marriage, though necessary to be pleaded and proved, is a point merely incidental, or preparatory only, to the principal issue in the cause. It was monstrous, too, as they held, to imagine, that a sentence, either for, or against, the marriage, in *such* a suit, would have the slightest obligatory effect on *third*

(a) See vol. 1, p. 5, *et seq.* ante.

(b) See vol. 1, p. 5.

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parties, though cited to "see proceedings" relative to it. Consequently, that such a decree, in the end, would be unproductive of any benefit to the wife, or children—whilst its issue, in the meantime, would be extremely injurious to the husband; by the introduction, namely, of additional parties into the cause, who might, probably at least, much protract and impede, and to his infinite cost, and vexation, any determination of the preliminary question. At all events, that the motion was premature; and founded in statements not duly verified.

The Court,

Said, that it was disposed to reject the application, *at present*, as made on mere verbal suggestions with respect to family settlements, &c., before an issue given, and even before the admission of the libel, in the cause. At the same time, especially as with reference to, and under sanction of, a proceeding similar to that now prayed, in the cause of *Donegal v. Donegal*, it should *probably*, be inclined to accede to it, if *duly* repeated, in a proper stage of the cause—especially in the event of the husband's giving a *general* negative issue to the libel, and, consequently, *denying* the marriage.

Motion (at present) rejected (a).

(a) In the event, the husband *actually* put the wife on proof of the marriage, by giving a *general* negative issue to the libel, as she, the wife, had expected. [See the note appended at the foot of the next case.] But the project of citing the *sisters* to "see proceedings," seems to have been abandoned by the wife—as the motion, *at present*, rejected by the Court, was not repeated on the part of the wife; although the judge had intimated, as above, his *probable* intention of acceding to it, if it had been repeated.

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4th Session.

(On the Admission of the Libel.)

**THIS** was a suit of separation, *à mensa et thoro*, by reason of adultery, instituted by Margaret Green Montague, the wife, against the husband, George Conway Montague.

The first article of the libel pleaded—that, by the laws, immemorial usages, and customs, of Scotland, a *valid* marriage between a man and woman, may, by their consent *per verba de præsenti*, be contracted by them in *that* kingdom; such man and woman being, respectively, above the age of pupillage (*a*); without any banns published, or licence had; and without the intervention of any religious ceremony—and, *that* the acknowledgment, by the parties, of each other, as husband and wife, and their public cohabitation, as such, is, by the laws, usages, and customs aforesaid, *presumptive* proof that such parties are validly married; and the same is taken to be *conclusive* evidence of their marriage; unless it be distinctly proved that they did *not* intend to contract marriage—and, *that* no consent of

A valid marriage between parties may be had, by their consent *per verba de præsenti*, in Scotland, such parties being, respectively, above the age of pupillage, without either banns, or licence, and without the intervention of any religious ceremony.

The public cohabitation of parties, as husband and wife, in Scotland, is presumptive proof that they are validly married; and becomes conclusive evidence of such, their marriage, in the event of its not being distinctly proved that, “they did not intend” to contract matrimony.

(*a*) “Which, by the law of Scotland, is the age of fourteen years, in males, and twelve years, in females.” These words were inserted after the word “pupillage,” on an objection taken, that the libel *should* have stated what the age of pupillage is, by the law of Scotland.

to be, of a Gretna Green marriage, is not pleadable, *qua* certificate, as in proof of that marriage; but it may be, as a constituent, wholly, or in part, of the marriage; accompanied by averments (to be sustained by evidence) of such being its effect, in, and by the law of Scotland.

A certificate, so purporting

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parents or guardians is necessary to the validity of a marriage between persons, both above the age of pupillage, by the laws, usages, and customs aforesaid.

2. *That*, in the months of August, September, &c. 1803, all, some, or one of them, G. C. Montague, then a bachelor, aged twenty-seven years, and free from all matrimonial contracts and engagements, paid his addresses to M. G. Wilson, then a spinster, aged seventeen years, and free from all matrimonial contracts and engagements—that they, the said parties, mutually agreeing to become husband and wife, went to Scotland, for the purpose of intermarrying *there*—and, on the 29th day of December, 1803, in the presence of divers credible witnesses, at Gretna Green, in the kingdom of Scotland, mutually acknowledged each other to *be* husband and wife, and were *validly* joined together in matrimony, according to *a* form of celebrating marriage occasionally used in the said kingdom (*a*); and, that the marriage so had, and celebrated, was, and is, a *valid* marriage, according to the laws, immemorial usages, and customs of Scotland.

5. The fifth article of the libel pleaded, *that* the parties consummated their said marriage, and lived and cohabited together, in Scotland, [at Edinburgh] as husband and wife, till the end of March, 1804,—

(*a*) For these words “according to a form of celebrating marriage, “occasionally used in the said kingdom,” were substituted in the libel, *as reformed* “by Joseph Paisley, who, upon that occasion, read, in the “presence of the said G. C. Montague, and the said M. G. Montague, “formerly Wilson, the office for matrimony contained in the Liturgy “of the Church of England, as by law established.” It had been *objected*, that the original pleading was too indefinite; and that the party was bound to *describe* the form.

during which time, they constantly owned, and acknowledged, each other as husband and wife; and were commonly accounted, reputed, and taken to be such, by, and amongst, their friends, acquaintance, neighbours, and others. And,

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8. The eighth article pleaded, *that*, at the time of the marriage of the parties pleaded as above, he the said G. C. Montague “obtained a *written certificate* (a) of his “said marriage from Joseph Paisley, the person who “celebrated the same at Gretna Green aforesaid, which “said *certificate* (b), he the said G. C. Montague preserved, and had frequently shewn to divers persons “of credit and reputation, upon one occasion, as lately “as the month of May, 1823;” and that “the said “*certificate* (c) was still in the custody, power, or possession, of the said G. C. Montague.”

Of *this libel*, the first and second articles were OBJECTED to, in certain particulars, which produced a reform of the articles in those particulars, under the direction of the Court, as specified in the margin. The fifth, was unopposed. But the main objections were addressed to the eighth article, as pleading, *sub modo*, a *certificate*, inadmissible in evidence. In support of this objection, the husband's counsel chiefly relied on a late cause, that of *Nokes v. Milward*, (d) in which a similar certificate had been rejected; and repeated, and re-adduced, the principles, and authorities, adverted to by the learned judge in that cause, in support of his

(a) Paper writing, purporting to be a certificate.

(b) Paper writing.

(c) Paper writing.

(d) See *Nokes v. Milward*, (a case in the Consistory Court of Rochester,) *post* p. 386.

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rejection of the certificate. Upon these grounds they contended, that *this* article of the allegation was altogether inadmissible.

For the wife, it was SUBMITTED, *in answer to this*, that the certificate in the case of Nokes v. Milward, was pleaded, *alio intuitu*; not as the *constituent*, in any sense, of a marriage, but in proof of a marriage, *otherwise* constituted; in which character they admitted it not to be pleadable. But where pleaded, either wholly, or in part, as a *constituent* of the marriage at issue (accompanied with an averment, to be sustained by evidence, of such being its effect in, and by, that law, which was ultimately to determine its validity) as in this instance, *they* maintained it to be, clearly, pleadable; and to have been so held, impliedly at least, by the learned judge, who determined the cause of Nokes v. Milward, itself. Here the acknowledgment of each other, as husband and wife, by the parties, and their public cohabitation, as such, (pleaded in the fifth article, which was not objected to) was pleaded, in the first article, to be, of itself, a *valid* marriage by the laws and customs of Scotland. *Non constat* but that this certificate was, it most probably was, an acknowledgment of each other, by the parties, as husband and wife, of the most authentic character; and so, of itself, not the proof, but the actual *constituent*, in part, of a marriage between the parties; in the event, of their cohabitation, as husband and wife, being proved, as pleaded in the fifth article, and of the laws and customs of Scotland being also proved, as pleaded in the first article, of the libel. So that, granting it to be inadmissible *quâ* certificate, it was, clearly, an instrument pleadable in this last character; and being, expressly so pleaded, in the

possession, or under the control, of the *other* litigant, it was competent to the party to plead it, on general principles, *as* in the article of the allegation, now objected to.

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Sir CHRISTOPHER ROBINSON.

I am quite of opinion, on the principles and authorities adduced, that the paper referred to in this article of the allegation is inadmissible *quâ* certificate, and that it ought not even to be so styled, in the pleadings. But taking it to be, what it may not improbably amount to, a declaration, under the hands of the parties, of their mutual acknowledgment of each other as husband and wife, would it not be admissible in that character, in conjunction with the facts, and the law, pleaded in this allegation? I think that it would; and, consequently, that this article of the plea, with a slight alteration, for the reason suggested, in the *form* of pleading, is entitled to stand. Should the instrument, on its production by the husband, not turn out to be what I have said that it *probably* is, the counsel for the husband will have the benefit of insisting upon *this*, or any other, topic in favour of the husband, arising from the appearance of the instrument, in a future stage of the cause; as permitting it to be *pleaded* in this form determines nothing with respect to its ultimate effect in the cause.

Allegation admitted, as reformed (*a*).

(*a*) To this plea, as reformed, a *general* negative issue being given on the part of the husband, it became incumbent on the wife, in the *first instance*, to prove her libel, *so far as related to the marriage pleaded and propounded in the cause*. This she, accordingly, proceeded to do—and the question at issue between the parties, *so far as*

1824. *regarded the marriage propounded*, came to a hearing in Trinity Term, Michaelmas Term. (8th July) 1825; when the judge held *that* the marriage was proved to have been had, *as pleaded*, and was *also* proved to be, *as pleaded*, a good and valid marriage by the laws of Scotland—whereupon he pronounced, decreed, and declared the said parties to be lawful husband and wife.

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The MARQUESS of WESTMEATH *against* the MARCHIONESS of WESTMEATH.  
By-Day.

(*On Motion.*)

The Court, if prayed, will direct its officer to attend with the papers in a cause, at the trial of an indictment preferred by one of the two litigant parties, against certain witnesses examined on behalf of the other, for a conspiracy to sustain, by false oaths, the case of that other. And, upon their conviction ensuing, it will permit this to be pleaded, in exception to the testimony of such witnesses.

**THIS** was a cause of restitution of conjugal rights, promoted by the most noble George Thomas John, Marquess of Westmeath, against the most noble Emily Ann Bennett Elizabeth, Marchioness of Westmeath.

In answer to the libel, which was in common form, her ladyship gave an allegation *pleading* cruelty, and adultery, which produced a *second* allegation on behalf of the Marquess. Evidence had been taken on these several allegations; and stood "*for publication*," at the prayer of both parties.

The proctor for the Marquess now brought in an affidavit, made by his lordship, and *prayed* the judge to direct certain exhibits, annexed to his allegation, to be attended with, in Dublin, on the first of January ensuing, for the purpose stated in such affidavit, viz.—to be produced at the trial of an indictment preferred by his lordship, in Dublin, against certain parties, *witnesses* in the cause, for a conspiracy, to *sustain* the commission of adultery (alleged in the cause) *by* the said Marquess, *with* a certain female in Ireland.



The JUDGE,

After decreeing "*publication*," directed that the exhibits should be attended with, by the officer of the Court, as prayed—and, at the same time, at the prayer of the proctor of the Marchioness, further directed, that such *other* papers and evidence in the cause as might be deemed requisite, should also be produced by the said officer, at the same time and place (*a*).

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(*a*) The papers, *generally*, in the cause, were accordingly attended with, in Dublin, by the officer of the Court, as severally prayed by the parties. Of the result, it is sufficient to say, (so far as respects the suit, depending in this Court) that, on the first session of Trinity Term [1825], the proctor for the Marquess brought in an allegation, (which was admitted by the Court) *pleading*, "that no faith or credit was due to the depositions of three witnesses (by name) examined on the allegation, wherein the said Marquess was charged to have committed adultery with a certain female, named Ann Connell—and further pleading, that, in the month of November preceding, the said Marquess had preferred a bill of indictment, in Dublin, against the said three witnesses, AND OTHERS, for conspiring and combining together, to maintain, and establish, by false oaths, that he, the said Marquess, had committed adultery with the said female—that, on trial, the said three witnesses, were found guilty; that, thereupon, one of the said three witnesses was sentenced to pay a fine of 20*l.*, and each of the other two, a fine of one mark—and further, that all three were sentenced to be imprisoned in his majesty's gaol of Newgate, in Dublin, for eighteen calendar months."

A copy of the record of conviction (pleaded to be a true copy, &c.) was exhibited, annexed to this allegation.

The principal cause in which these proceedings were had is still unheard.

Had the bill of indictment been preferred *in this country*, the object of this motion might, probably, have been attained by a "*subpoena duces tecum*" served on the officer of the Court, without any special application to, or order of, the Court itself.

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ORME v. ORME.

By-Day.

*(On the Admission of the Libel.)*

The Ecclesiastical Court can only interfere, in the way of restitution, where matrimonial cohabitation is suspended. The single duty which it can enforce by its decree in a suit of this nature, is that of married parties "living together:" it cannot attempt to enforce any, in super-addition to this. Hence, it is incompetent to the wife to sue the husband, or the husband, the wife, for "restitution of conjugal rights," pending cohabitation.

**THIS** was a suit, brought by the wife against the husband, for restitution of conjugal rights.

The libel was in common form, *mutatis mutandis*, save and except in the *fourth* article, which pleaded, *that* "The said Robert Orme, (the husband) being unmindful of his conjugal vow, had, ever since his arrival in England, in the year 1821, (as pleaded in a former article) without any lawful cause, withdrawn, and still did withdraw himself from bed, board, and mutual cohabitation, with the said Margaret Orme, (the wife); and had refused, and still did refuse, to render conjugal rights to her—and, *that* the said Margaret Orme, *though allowed by the said Robert Orme to reside in the same house with him*, was denied access to his person, and bed; and refused common necessities for her support, and maintenance."

*In* OBJECTION to the admission of the libel, it was said, *that* this was an attempt to enforce matrimonial interference, as distinguished from matrimonial cohabitation, for which there was no precedent—that Courts never interfered, in the way of restitution, but where matrimonial cohabitation was suspended—that the only restitution of conjugal rights to the wife by the husband, or vice versa, which an Ecclesiastical Court could make, by its decree, in a suit of this nature, was by compelling them to cohabit—consequently, that it was incompetent to married parties to sue, either, the other,

as for restitution of conjugal rights, they, the parties, *already cohabiting*. The words of the decree, in such suits as the present, are, *that* the husband shall “take the wife home, AND treat her with conjugal affection:”—there is no instance of a decree in such a suit, *that* he “shall treat the wife with conjugal affection; she, the wife, being AT home. The only remedy which the law affords to either of two married parties, in case of ill treatment by the other, is a proceeding for a separation *a mensú et thoro*, as by reason of *cruelty*:—and if the conduct of the party complained of fails to amount to *legal cruelty*, the complainant, however harshly or injuriously treated, is, still, without *legal* redress.

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On the other hand, it was SUBMITTED, that, though the Court had no means of regulating matrimonial intercourse, in *minor* points, where the *great* duties of matrimony were performed, still, *that* it had authority to interfere, in the description of case laid in the libel; where no one of those duties was fulfilled by the party complained of, save, and except, that of *mere* cohabitation, or living in the same house, with the complainant. And this was attempted to be made out by reference to a proceeding of the Court of Arches, in a late cause, that of *Gill v. Gill (a)*, in which the Dean refused to dismiss a husband who had *taken* his wife home, in obedience to a decree of the Court, in a suit for restitution of conjugal rights, made in the usual form, as above, on the distinct ground, of his non-compliance with that other part of the decree which enjoined him to “*treat her with conjugal affection.*” Hence,

(a) *Gill v. Gill*, Arches, Easter Term, 1823. See the judgment in this case, *post*.

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it was inferred, *that* the Court might enforce the latter, notwithstanding the subsistence of the former—if the Court can regulate matrimonial intercourse, *after* cohabitation *restored*, why not as well, it was said, *before* it is *suspended*?

JUDGMENT.

SIR CHRISTOPHER ROBINSON.

I think the objection taken to this libel is well founded—it sets up a case either, altogether, *without* the jurisdiction of the Court, or one, at least, very far transgressing those bounds of interference, to which it has restricted itself in modern practice. The parties are admitted to be actually cohabiting; and, being so, it is, in my judgment, quite incompetent to the Court to interpose between them, in the manner, and upon the grounds, now prayed. No instance of a libel, so framed as the present, in a cause of restitution of conjugal rights, is even pretended, on the part of the wife. The case of Gill and Gill, cited, I presume, as the *nearest*, is very far from being *strictly*, in point. The husband had been decreed there, in the usual form, (that suit commencing by a *libel* in the usual form), to “take his wife home, and treat her with conjugal affection;” and, moreover, to “certify his obedience to the decree, on a given day:” as the usual, and necessary, preliminary step, to his dismissal from the effect of the original citation. On that day, a certificate was tendered by the husband; in objection to the receipt of which the wife prayed, and was permitted, to be heard “on her petition:” and it clearly appearing, in the result, namely, on the facts disclosed in that petition, fully sustained by affidavits, *that*, although the wife had taken herself home (for so it appeared) in the absence

of the husband, still, that the husband, on his return, though without actually ejecting her, had treated her in a manner, certainly, evincing any thing but “conjugal affection,” under circumstances, the particulars of which were specified by the wife in her petition, and constituted, as there laid, a case of great hardship, the Court did refuse *then* to dismiss the husband; but directed him to certify over, as above, on a future day; when his certificate not being objected to, he was, *ipso facto*, dismissed. But this is far short of a precedent for the institution, *de novo*, of a suit for restitution of conjugal rights, on grounds, similar to the present, of the wife not being treated by the husband with conjugal affection—the cohabitation of the parties neither being, nor ever having been, suspended, that I am aware of. Matrimonial intercourse may be broken off on considerations, (of health, for instance, and there may be other) with which it is quite incompetent to this Court to interfere. As to that *other* charge of the wife being “denied common necessities” by the husband, this, however proper in the libel, in a cause of divorce by reason of cruelty, is improper, and unprecedented, in the libel in a cause of this description. The precedent, sought to be established, would lead to an infinity of suits, in no one of which the Court could embark with any reasonable prospect of satisfying, or doing justice between, the parties—and, so thinking, I hold that I am bound to reject the libel.

Libel rejected.

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IN THE CONSISTORY COURT OF ROCHESTER.

NOKES *v.* MILWARD, falsely calling herself NOKES.

**THIS** was a proceeding to annul a marriage, by reason, that one of the two contracting parties, the female, was another man's wife, at the time of its celebration. But the Court *refused* to pronounce a declaratory sentence of nullity—as thinking the marriage, in respect of which a sentence to that effect was prayed, not duly proved.

JUDGMENT.

Dr. SWABY.

This is a suit in which Mr. John Nokes, of the parish of Woolwich, in the county of Kent, and diocese of Rochester, is the plaintiff, and a female described in the proceedings, as “Rosa Milward, wife of Luke James Milward, falsely calling herself Rosa Nokes, wife of the said John Nokes,” is the defendant. The plaintiff's object in the suit is, to obtain a sentence declaratory of the nullity of a fact of marriage, alleged to have been had between him and the defendant, in Scotland, in the month of October, 1822; she, the defendant, then (and still) being, as pleaded, the wife of Luke James Milward.

The libel, the only plea which has been given in the cause, and none of the witnesses upon which have been cross-examined, first pleads, *that* the defendant, respectively, are the alleged contracting parties.

In a cause of nullity of marriage, the alleged fact of marriage, of the legal nullity of which a declaratory sentence is prayed, must be duly proved—in which part of his case, if the plaintiff fails, it is the duty of the Court to withhold its declaratory sentence of nullity; how clearly soever all the several facts may be established in evidence, upon which, had the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded.

This, at least, is the rule where the plaintiff and defendant,

then Rosa Ward, widow, was lawfully married to Luke James Milward, then a bachelor, in the parish church of Islington, in the county of Middlesex, on the third of October, 1821. A copy of the register of the said marriage is then exhibited; and the signatures thereto, Rosa Ward, and Luke James Milward, are alleged to be of the proper hand writing, respectively, of the parties so married. It is also pleaded, *that* the said parties consummated their said marriage; and cohabited, were reputed, and mutually acknowledged each other, as husband and wife, until in, or about, the month of July, 1822. The libel then pleads, *that*, at or about that time, the wife separated herself from the husband, and went to reside at Margate; where she assumed the names and description of Rosa Haden, widow: by which names, and under which description, she was introduced to, and formed a connexion with, Mr. John Nokes, party in the cause; and that, subsequently, she the said Rosa Milward was married to the said John Nokes, in manner as pleaded, at Gretna Green in Scotland, in the month of October, 1822, living the said Luke James Milward—of the nullity of which alleged marriage, as I have already said, it is the plaintiff's object, in this suit, to procure a declaratory sentence.

Now, *that* the present defendant is the identical female so married to the said Luke James Milward, as pleaded in the libel; and that the said Luke James Milward was living in, and subsequent to, the month of October, 1822, the date of her alleged marriage, *de facto*, with the plaintiff in the cause, as also pleaded, it may be sufficient to state, once for all, that I am *satisfied*,

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upon the present evidence. But, in my judgment, something still remains to be proved, in order to found the sentence prayed. Where the sentence prayed is a sentence declaratory of the nullity of an alleged marriage, that alleged marriage itself, at least in ordinary cases, surely requires, *especially*, to be proved. If then the plaintiff has failed in this part of his case, namely, in the proof of *that* marriage of the nullity of which he prays a sentence, it is still the duty of the Court, in my judgment, to withhold its sentence of nullity; how clearly soever all the several facts may be established in evidence, upon which, had the marriage itself been established by similar evidence, a sentence of nullity might well have been founded.

Let us see then, first, what, in particular, are the *pleadings* as to the alleged fact of marriage between the plaintiff and defendant in this cause—and, secondly, what is the proof.

The libel pleads (art. 4) that *a marriage* between the *defendant*, (then, and still, Rosa Milward, wife of Luke James Milward, but passing by the names and description of Rosa Haden, widow,) and John Nokes the *plaintiff*, was had, and solemnized, or rather prophaned, at Gretna, in the parish of Springfield, in the shire of Dumfries, and in that part of the united kingdom, called Scotland, on or about the 24th day of October 1822—and that they, the said parties, then and there, *acknowledged each other as husband and wife* respectively, in the presence of divers credible witnesses, who, together with the said parties, signed their names to a “certificate” of the said marriage. And it then pleads (art. 5) a certain paper writing, or exhibit, marked B.,



annexed to the libel, to be, and contain, that identical  
"certificate."

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Such are the *pleadings* as to this essential part of the case. And here it may be convenient that the Court, as in the first instance, should dispose of the *exhibit*, purporting to be, and contain, a "certificate" of this marriage, before it proceeds to consider the *proofs*, if any, furnished by witnesses examined in support of it.

I would first, however, observe that the pleadings themselves as to this essential part of the case are, in the highest degree, vague and unsatisfactory. It is first pleaded that a marriage was had, or prophaned between the parties—a marriage—but what kind, or description, of marriage; whether by, or without, the intervention of any, or if of any, of what, religious ceremony, and whether valid, or otherwise, by the law of Scotland, and so on, the very pleadings are silent about. It is then pleaded, that the parties mutually *acknowledged* each other as husband and wife, in the presence of witnesses, at this place, Gretna; which acknowledgment, the Court has been *told*, of itself, constitutes a valid marriage, by the law of Scotland. But the Court knows nothing of this, at least, judicially; nor can take counsel's word, which is all that it has, for this. It should have been so *pleaded*; accompanied with an averment, to be sustained by evidence, that such *was* its effect by the law of Scotland. It could hardly be that evidence taken upon a plea so constructed in this part of it as the present, could amount to any such *proof* of the marriage sought to be annulled, as would justify this Court in proceeding, as by its sentence, to annul it. But to the proofs.

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The exhibit in question, marked B., is in these words.

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B.

Kingdom of Scotland.

County of Dumfries.

Parish of Gretna.

These are to certify, to all whom it may concern, that John Nokes, from the parish of Chatham, in the county of Kent, and Rosa Haden, from the parish of St. Maries, in the county of Nottingham, being both here now present, and having declared to me that they are single persons, but have now been married conformable to the laws of the church of England, and agreeable to the kirk of Scotland.

As witness our hands at Springfield, this 4th day of October, 1822.

Witness,

Jane Rae.

John Ainslie.

Witness me,

David Lang.

John Nokes.

Rosa Haden.

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Now that a certificate of this description is any proof whatever of the marriage which it purports to certify, the Court has still to learn. It would have rejected this fifth article of the libel, with its accompanying exhibit, altogether, had the libel itself been submitted to it in the outset of the cause: and although, from this circumstance of the libel not having been objected to by counsel for the defendant, the certificate in


question remains an exhibit in the cause, and claims, as such, to be noticed by the Court; still the arguments of the plaintiff's counsel have failed to induce the Court to regard that certificate as any proof whatsoever of a marriage between this plaintiff and the defendant. Even the certificate of the king himself, under his sign manual, is, it is well known, no evidence of a mere fact (*a*) (much less is the certificate, so styled, of a private individual, without any designation of character, or office, which is the description of this exhibit), on the broad principle, that "*in judicio non creditur nisi juratis*." It is to be remembered, all along, that this certificate is exhibited as a *proof* of the alleged marriage; not, in any sense, as a *constituent* of it—which precludes any consideration of what might have been its effect, if introduced, *co intuitu*, into the cause. If this exhibit was meant to have been offered to the Court as a *constituent*, either wholly, or in part, of the marriage in question, it should have been *pleaded* to have been such, as I have said, in quite another form; accompanied with an averment, to be sustained by evidence, that such was its effect by the laws, customs, and usages of Scotland.

It is upon this same principle, that *certificates*, tendered in proof of irregular marriages, had in this country, (for instance, of *Fleet* marriages, which, though irregular marriages, were still valid marriages, prior to the marriage act of 26 Geo. II. c. 33,) have often been rejected by Courts of Common Law. (*b*) And the Court, in the course of the hearing, referred, though not

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(*a*) See *Ormichund v. Barker*. 2 Willes. 549.

(*b*) See *Lloyd v. Passingham*. 1 Cooper, ch. C. 155. *Read v. Passer*. Peak. N. P. C. 231. *Howard v. Burtenwood*. 1 Esp. N. P. C. 342. *Morris v. Miller*. 4 Burr. 2057, &c.

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by name, to a case, in 1763, in which a certificate of a Scotch marriage, pleaded in *proof* of that marriage as in this instance, was rejected by Dr. Bettesworth, sitting in the Consistory Court of London.

The name of that case, I have since ascertained to be "Owen, the mother, and testamentary guardian, of Small *v.* Spence." (*a*) In that case, which, like the present, was a suit of nullity of marriage, Dr. Harris objected to the *certificate* of Dr. Grant being received, in proof of a marriage, *certified* to have been had between the minor and the defendant, at the Red Lion inn, in Edinburgh; contending, *that* no such certificate was admissible, as *evidence*, on the principle already explained. It was said, in answer to this, by Dr. Hay, that the minor had signed it, and that the certificate would be proved to have been actually given. The Court, however, sustained the objection taken by Dr. Harris, and rejected the exhibit; admitting the rest of the allegation to proof.

The Court has been furnished, indeed, with an earlier case, that of *Wescombe v. Dods*," (*b*) in which

(*a*) Consistory of London, 2nd of July, 1763, before Dr. Bettesworth.

(*b*) Consistory of London, Easter Term, 1748. In this cause a libel was given in on the 13th of May, 1748, by William Wescombe, bachelor, against Rebecca Dods, spinster, alleging that she *falsely* reported herself to be contracted in matrimony with him.

On the first Session of Trinity Term, 1748, an allegation was given in by Rebecca Dods pleading, in substance.

Art. 1. That in October, November, and December, 1740, William Wescombe paid his addresses to her.

2. That they were married 26th of March, 1741, in the house of James Dow, gardener, at Castlebarns near Edinburgh, in presence of

Dow, spinster, Margaret King and others, by David Patterson, a minister of the established kirk of Scotland, according to the cere-

a certificate of this description should *seem* to have been admitted by the Consistory Court of London. But the cause of *Wescombe v. Dods* was a "*jactitation cause*" (not a suit of nullity of marriage, to which description of cause, not improbably, different considerations may apply in this particular); and the libel in *Wescombe and Dods* might, like that in the present cause, have been admitted to proof unopposed by counsel. What weight, or effect, if any, was attached to it by the Court at the final hearing of that cause, does not appear. True it is, again, that in the case of *Compton and Bearcroft (a)*, a suit, like this too, of nullity of marriage, a

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mony of marriage of the said established presbyterian Scotch kirk, of which the said Rebecca Dods was a member.

3. Article three exhibited, in supply of proof, a certificate under the hand of the said David Patterson, and pleaded the hand writing of Patterson; and that it was the usual form of certificates of marriage, solemnized by ministers of the Scotch kirk, and the identity of the parties.

4. Pleaded consummation at the house of George Blyth.
5. Pleaded confessions of the husband to George Blyth and others.
6. The birth and baptism of a child.
7. That the husband soon left the wife.
8. That shortly afterwards he wrote her a letter, subscribed "your loving husband."
9. Exhibited that letter.
- 10 That married women in Scotland are addressed (as in that letter) by their maiden names.
11. Was the formal concluding article.

This allegation was signed,

Thomas Salusbury.

(a) Arches, 16th February, 1767. Delegates, 4th February, 1769. The certificate, pleaded in the 7th article of the libel, was as follows:  
"This is to certify that I married, after the manner of the church of

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certificate perfectly similar to the present was annexed to the libel, as urged by the plaintiff's counsel: but the libel in *Compton v. Bearcroft*, was opposed by counsel for the defendant, and was rejected by the Court, *in toto*; so that its being annexed to the libel in that case, is no proof whatever of the admissibility of such a certificate in evidence.

The Court, having thus disposed of the "*certificate*" will now proceed to consider what is the proof by any witness, who can depose *of his own knowledge*, to the fact of any marriage whatever, (whether good, or otherwise, by the law of Scotland) having been celebrated in Scotland, between the parties to this suit; which, by the libel, is *pleaded* to have been had, in the presence of "*divers witnesses*," to this, however, the *single* witness examined is John Ainslie; and what is the effect of his testimony?

This witness, Ainslie, says, in substance, *that* he was, and still is, a postboy, at the Bush inn, at Carlisle—*that* one morning, about eighteen months before, as nearly as he can recollect the time, he was desired by the ostler to get ready a chaise and pair, to proceed with a lady and gentleman, who had arrived at Carlisle that morning, by the London mail, to *Gretna*, meaning to Gretna Green, in the parish of Springfield, and shire of Dumfries, in Scotland, distant, about eleven miles from Carlisle—*that*, accordingly, he prepared a chaise,

"England, Edward Bearcroft and Maria Caroline Compton, at Dumfries, 13th March, 1760."

(Witness)

Thomas English.

Thomas Huddleston.

R. Jamieson, Minister of the

English Chapel, at Dumfries.

in which a lady and gentleman, neither of whom he had ever seen before, were by him, the witness, driven to Gretna, and alighted at a small inn, called the Queen's Head, kept by one James Rae—that he, the witness, went with his horses into the yard, where the landlady, Mrs. Rae, presently came, and desired the ostler, in his presence and hearing, to 'go for the parson'—that shortly after, he saw one David Lang, whom he had known for many years, as officiating 'on similar "occasions" arrive at the inn, and accompanied him into a room near the kitchen, where they sat down together, and had a good deal of talk—that the parson, Lang, was then summoned by the landlady to the 'gentleman up stairs,' where his, the deponent's, presence was also required, in about three-quarters of an hour, or an hour after, by the said landlady, whom the witness followed accordingly, into a room up one pair of stairs, in which he found David Lang, and the lady and gentleman whom he had driven from Carlisle—that, the room door being shut, Lang desired the lady and gentleman to stand up; and, the deponent and Mrs. Rae also standing up, then proceeded to repeat (or, apparently to read from a book in his hand) *something*, of which the deponent can only say, that a part was like what is read by clergymen, in solemnizing marriages in churches in England—that, during the same, Lang, the parson, placed a ring on one of the lady's fingers, at the tip, which the gentleman applied his hand to, and slipped further down the finger—lastly, that, at one part of the ceremony, the said lady and gentleman, respectively, *acknowledged* each other as husband and wife." The witness then speaks to his having *signed* the certificate (a part of his evidence

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which the Court will dispense to itself, with reciting, as being disposed to reject the certificate altogether, further than merely to observe, that it is extremely slight, and unsatisfactory; especially in that the deponent, who describes himself as a poor "scholar with respect to reading or writing" is unable to depose any thing specific as to the signature of that instrument, by the parties to the alleged contract(a);) after which

(a) This part of the witness's deposition was—"that, after the ceremony was over, Lang, the parson, said to Mrs. Rae, and deponent, 'Here, 'you will sign the certificate' (pointing to a paper writing which the witness had before said that he observed lying on a table when he first entered the room) on which deponent and Mrs. Rae, subscribed their names, as witnesses; which he so did, without reading the same—that he believed it, at the time, to be a certificate of the marriage of which he has before deposed; but he does not *recollect*, whether the parties, or either of them, signed the said certificate *in his presence*, or whether their names (as sometimes happened on similar occasions) appeared already on the certificate when the deponent signed his name thereto—and they, the deponent and Mrs. Rae, having, as witnesses, subscribed their names to the said certificate, Lang, the parson, lapped it up, and gave the same to the lady". And, at the conclusion of his deposition, this witness after verifying the certificate, as by the signature, "John Ainslie" being of his hand writing, says, "that he does "not recollect whether it was subscribed, *in his presence*, by the "parties" purported to have been married.

Upon this evidence, it should seem, that the paper in question, would have been no proof, strictly taken, of a written acknowledgment of each other by the parties, as husband and wife, *in Scotland*: for *non constat* when, or where, it was so subscribed by the parties, though the signatures, "John Nokes" and Rosa Haden," were proved by other evidence to be, respectively, in the hand writing of the parties. Consequently, it should seem, that it would not materially have assisted the proof of an *acknowledgment*, by the parties of each other as husband and wife, *in Scotland*; even supposing this to constitute a *valid* marriage by the law of Scotland, which that it did, was not pleaded even, nor was the Court at all, *judicially*, informed.



having received orders to get his horses ready, he *put to*, and drove the said lady and gentleman back to the Bush inn, at Carlisle. The deponent says, *that* he has seen no more of either of the parties until quite recently; when a person, a stranger to him, and whom he did not recollect ever to have seen before, came to him at Carlisle, and introduced himself as Mr. John Nokes, whom he, the deponent, had driven with a young lady to Gretna Green, about eighteen months before, and bespoke his attendance in London to be examined as a witness in this cause. The deponent afterwards states himself to have seen the same person two or three times, here, in London; and he speaks to his *belief* of the identity of that person *with* the gentleman of whose *marriage* at Gretna Green, in 1822, he has previously been deposing, and *with* Mr. John Nokes, party in this cause.

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Such, in substance, is the testimony of the *single* witness who can depose, *of his own knowledge*, to ANY fact of marriage between the parties in the cause: and it is, in my judgment, obviously, of itself, far short of furnishing any such proof of a marriage, as will sustain the prayer of the libel that it may be pronounced null and void. Nor is this lack of *primary* evidence, at all, compensated for, by any *secondary* proof in the cause; as of consummation, cohabitation, mutual acknowledgments, &c. For even granting such secondary proof to be admissible in the case, which is very doubtful, (it being a case brought *inter vivos*, and by the one, against the other, contracting party) save only in corroboration of other, and more direct, testimony—namely, that of persons *present* (there being persons still living vouched

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to have been present) at the alleged fact of marriage—yet still, of the little of such *secondary* proof as appears in the cause, the *whole* is extra-libellate, and so, strictly speaking, is no proof; for with the taking leave, by the parties, of the postboy, on their return to Carlisle, this part of the plaintiff's case, *as laid in the libel*, absolutely ends. No consummation, no cohabitation, no mutual acknowledgments, beyond such as are alleged to have formed *a part* of the ceremony, are averred in the plea; so that the whole, I repeat, of what little is said by the witnesses as to either of these particulars, incidentally, is extra-libellate. And here, again, with respect to these *omissa* in the pleadings, the Court may observe, by the way, that, although a fact of marriage celebrated in England, *in facie ecclesiæ*, by a priest or minister in holy orders, according to the rites and ceremonies of the church of England; and, perhaps, a Scotch marriage, howsoever contracted, may be *good*, though it should not have been followed by consummation, or cohabitation, or mutual acknowledgments of each other by the parties, respectively, as husband and wife; yet it recollects no case where these have been *omitted* to be pleaded, except the *present*, from whatever cause, in regard to the *second* marriage only—as to which it should seem that they ought especially to have been pleaded, in order that the defendant might have the opportunity (whether she availed herself of it, or not) of making that species of defence suggested by the nature of her case, from the almost total absence of any proof by witnesses who could speak to the alleged fact of marriage from their own personal knowledge—the only evidence, probably,

after all as to *such* a marriage upon which the Court would have been justified to itself, in pronouncing that alleged fact of marriage null and void.

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Upon this view of the case, the Court, I think, is bound to pronounce, that the plaintiff has failed in proof of his libel; and, consequently, is bound to dismiss the defendant. It is first necessary, however, to advert briefly to one or two cases, cited by the counsel for the plaintiff, in which an Ecclesiastical Court has proceeded to a sentence of nullity, without full proof of the marriage declared null by its sentence—being *supposed* precedents by which *they* have recommended this Court to be guided in disposing of the present suit; in the event of its not conceiving the marriage in question so established in evidence, as to justify it in declaring that marriage to be null and void, upon higher, and more legitimate, grounds.

The cases cited were those of *Heseltine v. Murray*, *Fust v. Bowerman*, and *Watson v. Faremouth*; in each of which, the Court in which the suit was depending pronounced a marriage, therein pleaded, to have been void, *if any such were had*; plainly in the absence, as appears by the sentence itself, of *full*, at least, *proof* of the marriage.

Such are the cases cited. But there is one feature of *dissimilarity* between each of those cases, and the present, that bars any reasoning from the one to the other, in this particular, in my view of them. It is this. In no one of those suits were the plaintiff and defendant, respectively, as they are in this suit, the alleged contracting parties; for the marriage sought to be impeached, in every one of them, was not only a marriage to which the party complainant, was, *personally*, not

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privity; but it was a marriage, the particulars of which, in all probability, were studiously concealed from the party complainant by the defendant; and this, expressly in order to defeat the object of the suit, namely, a sentence annulling that marriage. Consequently, it would have amounted, at once, in effect, to a defeazance of the suit, to have required strict proof of the marriage sought to be annulled *from* the complainant, in any one of *those* cases—a special consideration, which accounts for the hypothetical form of the sentences in all those cases, but is, in no degree, applicable to, or would justify a sentence in that form, in a case circumstanced like the present.

In the first of those suits, his late majesty, acting by his procurator general, was the plaintiff, or complainant (*a*)—the object of the suit being, to obtain a

(*a*) *Heseltine v. Lady Augusta Murray.*

This was a suit brought by letters of request, from the judge of the Consistory Court of London, in virtue of which, Heseltine, the king's proctor, prayed a citation, on the 20th of January, 1794, against Lady Augusta Murray, in a cause of nullity of marriage.

An appearance having been given for the party cited, a libel was afterwards brought in, and admitted, pleading the statute of 12 Geo. III. c. 11, rendering any descendant of the body of king George II. incapable of contracting marriage, under the age of twenty-five, without the royal consent declared in council, and pleading the birth and descent, of Prince Augustus Frederic, (now Duke of Sussex) and that no *royal consent* had been given to his marriage; and further pleading, *that*, on the 4th of April, 1793, Prince Augustus Frederic being under twenty-one years of age, a marriage, or rather a shew or effigy of marriage, was, in fact, had or solemnized, or pretended so to be had, or solemnized, in the house of Lady Dunmore, at Rome, (*but by whom the party proponent was unable to set forth*) between the Prince, and Lady Augusta; that they shortly after came to England, and, on the 4th of December, 1793, were married by banns, in the

sentence declaratory of the nullity of the marriage, *de facto*, of his present Royal Highness, the Duke of Sussex, with Lady Augusta Murray, the defendant, as

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parish church of St. George, Hanover Square; and that both the marriages were void, for want of the royal consent, by virtue of the statute aforesaid.

Two exhibits were pleaded, viz. an extract from the baptismal register of his royal highness, and an extract from the marriage register of St. George's, Hanover Square.

The law of Rome, or the validity, or invalidity of the marriage by that law, was in no manner whatever, pleaded in the cause. The libel was settled by the present Lord Stowell, (then Sir William Scott, king's advocate.)

Lady Augusta's proctor declared that he confessed the statute 12 Geo. III. to be a public act; and also confessed the two marriages pleaded in the libel; but, otherwise, contested suit negatively.

There was no direct proof of the marriage at Rome; but Lady Dunmore deposed that she *believed* (because she was so assured by her daughter Lady Augusta, and also by a letter from the Prince) that they were married in her, Lady Dunmore's, house, at Rome, by a clergyman of the church of England in full orders.

Extract from the Interlocutory, pronounced by Sir William Wynne, (dean of the arches) 14th July, 1794.

"And the judge did also pronounce, decree, and declare, that in respect to the fact of marriage, or rather shew, or effigy, of marriage, pleaded in the said libel to have been had, or solemnized, or pretended to have been had, or solemnized, at the house of the Right Hon. Charlotte Countess of Dunmore, in the city of Rome, on the 4th day of April 1793, *there is not sufficient proof by witnesses*, that any such fact of marriage, or rather shew, or effigy of a marriage, was, in any manner, had, or solemnized, at the said city of Rome, between his said Royal Highness, Prince Augustus Frederic, and the Right Hon. Lady Augusta Murray, spinster, the party cited in the cause; but that if any such marriage, or rather, shew, or effigy of a marriage, was in fact had, or solemnized, at the said city of Rome, between the said parties, the said pretended marriage was, and is, absolutely null, and void, to all intents, and purposes in law, whatsoever."

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had in violation of the royal Marriage Act. In *Fust and Bowerman*, the wife, *de facto*, was a lunatic ; and the marriage was sought to be avoided, on her behalf, and by her committee. And the case of *Watson v. Faremouth* (a cause of nullity of marriage by reason of incest) was, at the promotion of a party having a civil interest in the husband's estate, liable to be defeated in the event of his marriage not being impeached, with effect, during the *joint* lives of himself and his wife, *de facto*, the contracting parties. Now in either of those suits, I repeat, to have exacted strict proof of the marriage from the complainant, would have been, at once, to defeat the suit : so that, in each of those cases, the nature of the decree is accounted for by the special circumstances of the case. And the decree, consequently, in no one of them, furnishes a precedent, by which the Court, in my judgment, should be guided in disposing of the present case.

The Court has been prayed, indeed, to rescind the conclusion of the cause for the purpose of receiving additional pleadings and proofs as to this asserted fact of marriage—in support of which prayer, it has been told, that the complainant is a young man, now, or lately, in his clerkship to his brother, an attorney, and one whose means are, probably, small. But the plaintiff is not one for whose relief an Ecclesiastical Court is bound to go out of its way, as it appears to me, upon several considerations. For instance, in cases of a similar description, an allegation has *commonly* appeared

The sentences in *Fust and Bowerman*, [Arches, Delegates, 1789.] and *Watson v. Faremouth* [Arches 1811] were in a similar form, *mutatis mutandis*, and for similar reasons. For the last of these cases, See 1 Phillimore, p. 355, 357.

in the libel, that the complainant has withdrawn from all further cohabitation with the defendant, from the time when he discovered the alleged invalidity of his marriage. The *fact* may have been so in the present instance; but there is no proof to that effect, nor even any plea. Again; if no impediment to the plaintiff's marriage with the defendant was known, or supposed, *at the time*, to have existed, why was their marriage to be celebrated in Scotland? The parties were both *majors*; and, that the plaintiff, prior to that time, had introduced the defendant to his mother and brothers as his *intended* wife, is in evidence in the cause; so that no motive, as of concealment in *that* quarter, can be probably suggested. Upon the whole, should I err in refusing to pronounce a declaratory sentence, upon my impression from the proofs before me, the party may still be able, namely, on appeal, either to amend his case by pleading, and proving new facts, if he shall be so advised, or to obtain a revision of it, (if *that* be preferred) on the *present* evidence—but from the result of that evidence, I feel myself called upon to pronounce that the plaintiff has failed in proof of his libel; and to *dismiss* the defendant.

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## HILARY TERM.

1st Session.

IN THE ARCHES COURT OF CANTERBURY.

BRUCE v. BURKE.

1st Session.

(On Motion.)

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A party who has once prayed publication, though stopped by an asserted allegation, is not at liberty to produce further witnesses upon his plea, as a matter of course—that is, not without special ground laid, and by leave of the Court—in the event of such asserted allegation not being actually filed.

**W**HERE publication of the evidence taken in a cause has been prayed by one of two litigant parties, the mere assertion of an allegation by the other is not sufficient, *per se*, to re-open the term probatory to that one; no such asserted allegation being filed by, and, consequently, no new term probatory being assigned to, the other litigant. A party therefore who has once prayed publication, though stopped by an asserted allegation, is not at liberty to produce and examine a further witness, or further witnesses, upon his libel or allegation, as matter of course—that is, not without special ground laid, and by leave of the Court—in the event of such asserted allegation not being actually filed.

In the particular case—a cause of nullity of marriage by reason of a former marriage—there being no affidavit in support of the prayer, to examine a fresh witness on the part of the defendant, who had formerly prayed publication,—(which publication, however, was stopped



by an asserted further allegation on the part of the plaintiff; she the plaintiff, now declaring that she gave no further allegation and praying, in her turn, publication of the whole evidence in the cause) the Court refused leave to produce and examine the proposed witness on behalf of the defendant, and ordered publication to pass.

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## BURGOYNE v. FREE.

1st Session.

(On Protest.)

**THIS** was a cause of office, (a) promoted by Montague Burgoyne Esq., against the Rev. Edward Drax Free D. D., rector of the parish of Sutton, in the county of Bedford, and archdeaconry, and commissaryship, of Bedford. The citation issued under, and in virtue of, *request* made to the dean of the arches, by "the worshipful Richard Smith, A. M., *commissary* of the Hon. and Right Rev. Father in God, George, by divine permission, Lord Bishop of Lincoln, in, and throughout, the whole archdeaconry of Bedford, in the diocese of Lincoln, lawfully constituted."

"Letters of request" from a bishop's "*commissary*" go, in the same course with the "*appeal*,"—that is, not to the diocesan, but to the metropolitan, Court; the Court of Arches.

An appearance was given for the party cited, under *protest*: and

*It was contended on his behalf*, that the letters of request signed in this cause, lay, *properly*, not to the Court of Arches, but to the diocesan Court at Lincoln—so that a citation issued in virtue of such letters of request, was not *compulsory* on the party cited—for the following reasons.

(a) For offences of what description, see the next case.

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Letters of request, *ordinarily*, lie where the appeal lies, and for this reason, The judge who signs them by so doing, waiving or remitting his own Court, (which is all that he *can* do) the jurisdiction which, generally speaking, at once *alone* attaches, is that of the appellate Court. Thus from all peculiars, [*i. e.* places exempt from episcopal jurisdiction] both appeals, and letters of request, lie, at once, to this, the metropolitical Court : for it is the jurisdiction of this Court that, at once, *alone* attaches in those cases. For instance ; where an archdeacon, who has a peculiar, waives, or remits, his Court, there is no other Court which *can* take cognizance of the cause than this, the Court of Arches ; to which, accordingly (being *also* the *appellate* Court) letters of request undoubtedly lie. So, again, from Courts which are not peculiars, but subject to the diocesan, letters of request, generally speaking, go in the same course with appeals, for the same reason. Thus where an archdeacon, who has *no* peculiar, waives, or remits his Court, the jurisdiction that immediately attaches, is that of the diocesan Court ; to which Court, accordingly, letters of request lie (being here also, again, the *appellate* Court) repeatedly so decided. In short, where the inferior ordinary waives, or remits, his Court, the appellate Court, generally speaking, is *alone* competent to take cognizance of the cause : and this it is which has given rise to the notion—a notion generally speaking, perfectly correct—that letters of request go in the same course with appeals ; or, in other words, that the inferior ordinary must make request, or instance, of jurisdiction to that judge, into whose Court the cause must have been appealed, had he himself proceeded in it, in the first instance.

But if letters of request from a commissary lie to the diocesan, and not to the Court of Arches, in this instance, it should seem, that they lie in a *different* course from the appeal. For by the statute of appeals, 24 Hen. VIII. c. 12, the appeal from a bishop's *commissary*, it should seem, lies to the metropolitan. But what then? Where is the authority for saying that letters of request *must*, *universally*, and under *all* circumstances, lie, where the appeal lies. No authority whatever can be cited for that position. On the contrary, it is obvious, from the following considerations, that, in this particular (the present) instance, though the appeal *may* lie to one Court, the letters of request *must* lie to another.

By the canon law, beyond all doubt or question, the appeal from a *commissary* lies to the diocesan, and not to the metropolitan. This may be proved by a host of authorities. Maranta, for instance, after stating "*quod a sententia vicarii seu substituti non appellatur ad substituentem, puta episcopum, ex quo fit idem tribunal, sed appellatur ad superiorem substituentis*," immediately adds, that this rule only applies, in the case of a *vicar general*, "*quia ille dicitur habere ordinariam jurisdictionem quam habet episcopus. Secus, si esset aliquis deputatus vicarius particularis, in una causa tantum, vel in uno loco particulari diæcesis qui dicitur vicarius foraneus seu ruralis*," (the precise definition of a modern commissary) "*quia tunc dicitur iste vicarius habere delegatam jurisdictionem; et ab eo potest appellari ad episcopum, vel ad alium substituentem, seu ad vicarium generalem*." (a) So Lyndwood, speaking of official *principals*, says; an official *principal* is he "*qui habet idem consistorium cum episcopo deputante*"—

(a) *Spec. Aur.* vi. ii. 381. See also iii. v. 14, 15.

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whence (a) he adds— "*à tali officiali non appellatur ad ipsum episcopum sed ad eum ad quem appellari debet ab ipso episcopo—ab officiali vero foraneo,*" [that is, from a commissary] "*ad ipsum episcopum appellatur* (b). And, not to multiply instances, these doctrines are adopted, nearly in the same words, by Aylyffe, in his *Parergon*, p. 165.

It perhaps may be conceded, on these authorities, that, by the canon law, the *appeal* from a commissary lies to the *bishop*. The statute of appeals, however, 24, Hen. VIII. c. 12, *seems to say*, that the *appeal* from a commissary lies to the *metropolitan*. This expression "*seems to say*" is adopted, from Gibson, for the following reason. The statute of appeals, as clearly appears, both from the preamble, and the purview of that statute, was simply meant to prevent appeals to the See of Rome, *out* of the realm, and not, at all, to alter the course of appeals *within* the realm. And by the word "*commissary*," in that statute, most probably, was meant, and intended, the bishop's *chancellor*, or chief commissary (c), (often styled his *commissary*, simply;

(a) That is—" *ne ab eodem ad seipsum appellatio interposita videatur*"—as the bishop and chancellor have both but one auditory; in the language of the canon law, "*faciunt idem consistorium*." It is manifest that no such absurdity resulted from an appeal lying from the bishop's *commissary* to himself or his chancellor, which is the same thing—and by the canon law, most unquestionably, the appeal did so lie.

(b) Lynd. Oxf. edit. p. p. 80 and 105.

(c) The term "*chancellor*" not occurring in the statute at all—so that, if by the term "*commissary*" was not meant his "*chancellor*," the statute is silent as to where the appeal from the bishop's "*chancellor*" lies, altogether. The words of the statute are, "*from a bishop, or his commissary, to the archbishop*"—And this, says Gibson,

in acts and instruments, at that time) and not a commissary *in partibus*, such as the commissary of Bedford, who signed these letters of request. But be that as it may—admit that by practice, and on the authority of the case of *Cart v. Marsh*, [Strange, 1080] the appeal, even from *such* a commissary, lies to the Court of Arches, and not to the diocesan Court, what is that to *letters of request*? There is not only no authority, as already said, for the position that letters of request *must* lie where the appeal lies; but the contrary is even plainly directed, in this instance, by the “Bill of Citations,” 23 Hen. VIII. c. 9. For the “Bill of Citations,” after providing that none shall be cited *out* of their dioceses, under great pains and penalties, but in particular cases, (one of such cases [see the fifth reservation] being, in case of letters of request,) adds, “*that such letters of request shall still be governed by the canon law.*” Consequently, if, by the canon law, that is, before, and independent of, the statute of appeals, appeals lay from the commissary Court, to the diocesan Court, and not to the metropolitanical Court, letters of request still lie to the diocesan, and not to the metropolitanical Court; for the statute of appeals, *at least*, has made no *alteration* in the law, *as to letters of request*.

And this course of making *request*, is precisely con-  
[Cod. 1036] commenting upon these very words, for the reason given in the canon law, namely, lest (having both but one auditory) the appeal might seem to be made from the same person to the same person, if it lay to the bishop. Gibson, plainly, then by this word “commissary” in the statute understood the bishop’s “chancellor”: for though a bishop’s chancellor, or *chief* commissary, has “*idem consistorium cum episcopo deputante*,” his commissary *in partibus*, as already shewn, has not—so that if the word “commissary” in the statute is understood of a commissary *in partibus*, Gibson’s *reason* is inapplicable altogether.

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sonant to the general principles of the canon law, for this further reason. The bishop's vicar-general, or chancellor, which is the same thing, is an *ordinary*. The bishop's commissary is not an *ordinary*, but a mere *delegated* judge (a), who is bound, by the canon law, to keep strictly within the terms of his commission, which is "*stricti juris et extraordinariæ jurisdictionis, neque extendi potest ultra quod stricte comprehensum in rescripto. — Quicquid igitur in rescripto non est expressum, pro omisso habetur*" (b). Here the commissary's *patent*, by the way, giving him no power to sign letters of request, it may be questionable, at least upon principle, whether it be competent to him, by the canon law, to make request at all. But if it be, he must make it to the diocesan. For being, as already shewn, a *delegated* judge, he is bound, by the canon law, as *such*, if for no other reason, to make *request* to him only who deposes him. The canon law is express to this. Thus *Alciat*, for instance, [*Praxis* p. 40]. "*Judex delegatus semper ab eo debet querere* (c), *a quo delegatus est*"—a position repeated in nearly every *practical* book of authority, as one that admits of no question.

(a) *Vicarius, generalis dicitur ordinarius—secus vicarius specialis datus in una terra diœcesis, vel in certâ parte causarum tantum, quia ille est delegatus, non ordinarius, judex: Maranta iv. v. 14.*

*Officiales principales vices episcoporum generaliter tenent, et ideo ordinarii sunt censendi: secus tamen æstimo in officialibus foraneis, etiam episcoporum: hi tantum delegati judices.* Lynd. p. 80. Nor, he says, does it make any difference in this respect that they are delegated "*ad universitatem causarum*," so long as they are restricted to a certain part, only, of the diocese. And see to the same effect, *Ayliffe*. Par. p. 165.

(b) *Gail Praxis*. 68.

(c) That is—*ad eum referre causam*—or, to make request to him.

In short, the true principle, (the only principle of *universal* application) as to letters of request, is, *that* the judge who signs them, by so doing, *merely* waives, or remits his own court: it being constantly added to this, that "he hath no power to give, or appoint, a "Court." Consequently, there being still, *within* the diocese, a superior Court, competent to take cognizance of the cause, be it what it may, after and notwithstanding request made by a commissary, a *compulsory* citing *out* of the diocese by the metropolitanical judge, merely, in virtue of such request to *him* addressed (rightly or wrongly) *by* a commissary, is against the "Bill of Citations" and radically faulty: it not being open to the commissary, by his mere signature, to pass over his diocesan (*a*); and to send up the subject, *against his will*, *out* of his own diocese, to the metropolitanical Court, in the first instance. The "Bill of Citations" has, for its great object, the ease of the subject in two particulars—to save him expense and charges, and to give him a *double appeal*. The object of the statute has been so, *judicially*, expounded: and the subject has also been, *judicially*, said to be entitled to the most *favourable* interpretation of that statute (*b*). But the

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(*a*) In support of this, the case of *Hodges v. Hodges* [Arches, 1791] was cited, in which the letters of request, *signed by Dr. Heslop, as commissary for the archdeaconry of Buckingham, were counter-signed by Dr. Beaver, as chancellor of the diocese*. But the Court held that this might have been done, in that instance, *ex majori cautela*, and did not infer it to be actually *necessary*.

(*b*) See *Jones v. Jones*, Hob. 185. It is there, too, expressly said, that a commissary cannot *refer a cause* to the archbishop, but only to his diocesan. This long after the statute of appeals. And of all the common law reporters, Lord Ch. J. Hobart seems to have been the one best acquainted with ecclesiastical proceedings.

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sole interpretation of the statute which can avail to defeat this protest, must be an *unfavourable* one: and to the prejudice of the subject in both those particulars, as to which the “purpose of the statute was to “provide for his ease”(a). Admit, however, that a commissary may sign letters of request to the metropolitan, especially at the instance of a promovent, *ante litem* (b), for this reason, that the promovent might have cited the party into the diocesan Court, at once, without any letters of request from the commissary, where, as admitted in this case, the chancellor has a *concurrent* jurisdiction with the commissary in places within the commissary’s more immediate jurisdiction. Admit that *this* may lay even a good foundation for the commissary’s signing letters of request to the *metropolitan*. But the question still occurs, what is the true effect of a citation issued by the metropolitan Court, in virtue of such letters of request? It should seem clearly to be only this. It may, very possibly, be sufficient to found the jurisdiction of the metropolitan Court, if the party appears, and submits. On this very same principle it is that an appeal may be good, “*omisso medio*” Thus Maranta, after laying down that appeals must be made “*gradatim*,” and that “*appellatio non valet, omissio medio*,”

(a) Jone’s case, *ub. sup.*

(b) For it is to be remembered that, by the canon law, request or instance of jurisdiction, may be made by an inferior to a superior judge, in any part of the cause, if he thinks fit; as well as, at the instance of a plaintiff or promovent, *ante litem*, or before the institution of the suit. Thus Durand [de rel per.] “*Judex referre potest causam quandocunque sibi videbitur expendiens—ante litem; in medio litis; vel quancumque.*” And Alciat to the same effect, [Praxis. p. 141.] “*Quoties expedit, ex justa causa et necessaria, fit* “RELATIO.”



adds, that this does not hold [*non procedere*] "*quando fieret appellatio, omissio medio, et non opponeretur: tunc enim procedit appellatio, et valet processus; quia videntur partes consentire, et jurisdictionem prorogare (a)*" So, here, if letters of request are signed by a commissary to this Court, and "*non opponerentur, valet processus.*" But if they are opposed "*non valet processus*"—a citation issued in virtue of them is *not compulsory*; nor is it competent to this Court to enforce them, by putting the party in contempt, for not giving an absolute appearance to the citation.

*In reply to this it was* **CONTENDED**—that the uniform course of request had been from a commissary to the metropolitan—that no instance could be cited of an objection ever taken to this; and that the practice, so acquiesced in, had become settled law; and was not liable to be altered or defeated, on the grounds, and for the reasons, now suggested. *That, in truth and substance,* the Court would provide better, the *ease* of the subject, by strictly maintaining this practice, than by sanctioning *any* abandonment of it—the effect of which might be the introduction, in many instances, of a *third* Court, before the suitor could arrive at a *final* decision of his cause, namely, by the Court of Delegates—that the subject had an appeal, though his cause was heard, in the first instance, in the Court of Arches; and that this was sufficient: as the law (granting it to have been *otherwise*, at one time, even *judicially*, expounded) dis-  
countenanced *double* appeals; deeming such double appeals really inconvenient to suitors, and not any benefit—finally, that suits of this nature were more fitly instituted in the Court of Arches, (where the

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(a) *Aur. Spec.* vi. 11, 368, 373.

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assistance of counsel was to be had) than in any diocesan Court; in no one of which, were the aid and advice of civilians (at least *immediately*) attainable. And

The COURT,

As inclining to this view of the subject, *generally*, for the reasons stated above, over-ruled the *protest*, and ordered the defendant to appear *absolutely*.

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BURGOYNE v. FREE.

(On Admission of the Articles)

Articles against the defendant (a clerk) for *incontinence*, among other offences of ecclesiastical cognizance, admitted to proof (though no *incontinence* was charged within eight months before the commencement of the suit) notwithstanding the statute, 27 Geo. III. c. 44—it being held by the Court, that this statute only applies to suits against laymen, for mere *incontinence*, in order to the infliction of penance; and not to suits against clerks for general unfitness to discharge their clerical functions, (such general unfitness to be inferred from this of *incontinence*, among other offences); in order to their suspension or deprivation

**THIS** was a cause of office promoted by Montague Burgoyne Esq. against the Rev. Edward Drax Free D. D., for *incontinence*, profaneness, irregularity in the performance of divine offices, and other offences, of ecclesiastical cognizance.

*Upon the ADMISSION of the articles*,—an objection was taken for the defendant to the admission of those articles, (the 4 to the 13th inclusive) charging the defendant with several acts of *incontinence* with different females. These charges commence, *it was said*, in 1810—fifteen years ago—the last act charged, is in the beginning of May, 1823—the citation issues in the middle of October, 1824. Consequently, it is incompetent to the Court to put the defendant on his answer to such charges, under the statute 27 Geo. III. c. 44, which expressly provides, that “no suit shall be brought

mere *incontinence*, in order to the infliction of penance; and not to suits against clerks for general unfitness to discharge their clerical functions, (such general unfitness to be inferred from this of *incontinence*, among other offences); in order to their suspension or deprivation

in any Ecclesiastical Court for fornication, or incontinence, after the expiration of eight months from the time when the offence shall have been committed."

Hence it was prayed that the Court would reject the articles in question, from the 4th to the 13th, inclusive—and so dismiss that part of the charge, altogether, respecting the fornication, or incontinence, objected to the defendant.

*In answer to this it was argued on behalf of the promovent, that the act would appear from its title—"an act to prevent frivolous and vexatious suits,"—to be inapplicable to the present proceeding,—that it could only be taken to apply to suits commenced against laymen, for mere incontinence, or fornication: and not to grave charges against a clerk, of general unfitness to discharge his clerical functions, for sundry offences—some of such, among many other, being the offences of fornication or incontinence.*

*In reply to this, again, it was contended, on the defendant's part, that the purview of the act was general—"no suit shall be brought; &c,"—and that no rule of interpreting statutes was better understood than this: that although the *preamble* (including the *title*) of an act may be called in to open or explain the act; still, that it shall *not* be, to restrain the operation of enacting clauses which have *general* words from that full latitude, which the clauses expressed in such general words, of themselves, and without any such reference to the preamble of the act, would plainly import—that the act, on the face of it, implies no distinction between clerks and laymen, in this particular; and that to argue clerks protected from suits for mere fornication or incontinence, after the expiration of eight months, by*

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the act; and yet, to be liable, *at any time*, to suits for unfitness to discharge their clerical functions, such unfitness to be inferred from their having been guilty of fornication or incontinence, *notwithstanding* the act was absurd: *that* if the mere insertion of other charges was to render it competent to the Court to proceed, *at any time*, against clerks for fornication or incontinence, the statute might be so easily evaded, namely, by the insertion of one or two other offences, how frivolous or unfounded so ever, in the articles of charge, as to render it, in its application to clerks at least, altogether nugatory—*that* the act, by its very title, respects *vexatious*, as well as *frivolous* suits; and that suits of this nature, out of time, against either clerks or laymen, (after a lapse of five, or of ten, or, as in this case, of fifteen years) whether frivolous or not, are vexatious, on that ground only—*that* in proportion as such offences are more penal in clerks, than in laymen, *some* limitation, in point of time, as to *suits* for such offences is, perhaps, more necessary in the instance of clerks, than it is, in that of laymen—lastly, *that* the statute had constantly received the interpretation now contended for in *practice*, to this extent at least; *that* opinions to that effect had repeatedly been given, by (possibly every) counsel of (any) standing at the bar (a);

(a) See too the case of *Schultes v. Hodgson*, *ante* vol. 1. page 321, where the incontinence charged on the defendant, (a clerk in orders, like *this* defendant, and proceeded against in a similar suit, in order to the infliction of a similar penalty) was expressly *pleaded* to have been committed "*within eight calendar months from the commencement of the suit.*" In the case of *Schultes v. Hodgson*, indeed, the articles were admitted, where the suit *commenced*, in the Consistory Court of Sarum; it only came to this Court, the Court of Arches, by *appeal*. It was not

and *that* no suit similar to the present, under similar circumstances, had been attempted to be instituted, in the long interval between the passing of the act, and the present day. If the Court had any reasonable doubt; the defendant was said to be clearly entitled to the benefit of that doubt, so as to be dismissed from this part of the charge.

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Sir JOHN NICHOLL.

The question raised by this objection is a new question, and it is one not unattended with some doubt and difficulty. On the one hand, the title of the act, which may be looked to for its object, in the case of this, as of other statutes, would seem to imply, that it was for the protection of individuals; (laymen) from suits for fornication, in order to the mere infliction of penance, after a limited time: and the particular occasion of the passing of the act, which the Court recollects to have been, certain suits against laymen for fornication, long after the alleged commission of the offence, then lately depending in an ecclesiastical Court in the west of England, and the proceedings in which were the subject of pretty general comment at that time, infers *this*, again, to have been its true object. Hence I am strongly disposed to think, that the legislature, in passing this act, had no intention to interfere, at all, with suits instituted for the correction of clerks; or, in other words, to prevent suits, like the present, against clerks, in order to their suspension, or deprivation for incontinency among other *offences*, though

therefore cited in the argument, by way of "*authority*;" but merely as illustrative of the construction that had been, *generally*, put upon the statute.

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no actual incontinence should be chargeable upon the particular defendant, within eight months from the commencement of the suit. On the other hand, however, the words of the enacting clause, in themselves, and without reference to the preamble of the act, certainly are sufficiently broad, as contended, to render it incompetent to the Court to entertain the present suit, so far as the charges of incontinence are concerned. Upon the whole, however, after the best consideration that I have been able to give to the subject, the statute appears to me so clearly to have been framed, *alio intuitu* to that for which it is invoked, that I shall admit the articles objected to; leaving it to the defendant to appeal, if he thinks proper, to a tribunal, of which judges of the common law are necessarily a component part; (a) or, if he prefers that course, to apply for a prohibition to one of those Courts, whose peculiar province it is to construe acts of parliament—any one of which is, of course, more able than this Court to put a right interpretation on the statute, on which alone the objection taken to these articles, *avowedly*, rests. (b)

(a) The Court of Delegates.

(b) The defendant, in the following Easter Term, moving the Court of King's Bench for a *prohibition*, a *rule* was made to *shew cause*, why the Court of Arches should not be *prohibited* from holding suit, as to the charges of incontinence objected in these articles. Upon "*cause shewn*," the Court of King's Bench directed that the plaintiff (the defendant in *this* Court) should *declare* in prohibition. And here at present, (September 1825) the matter rests.

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FULLER v. LANE.

(On Appeal from the Commissary of Surry's Court.)

By-Day.

**THIS** was a question respecting the appropriation of a pew in a parish church by *faculty*; in which the law respecting the appropriation of pews by faculties; and the principles by which ordinaries should be governed in disposing of applications for the issue of such faculties, especially as with reference to the circumstances of *the times*, were fully entered into; and were stated by the Court, at large, in its judgment.

JUDGMENT.

Sir JOHN NICHOLL.

This is a question respecting the appropriation, by faculty, of a certain pew, in the parish church of Lingfield, in the diocese of Winchester, and county of Surry, to Thomas Lane, the respondent in this Court. Mr. Lane originally applied for this faculty to the commissary of Surry, within the limits of whose jurisdiction Lingfield is situate. Accordingly, a citation issued from the commissary of Surry's Court, in June, 1821, calling upon the minister, churchwardens, and parishioners, of the said parish of Lingfield in special, and all others having or pretending to have any right, title, or interest in the premises, in general, to appear and shew cause, why a license or faculty should not issue for confirming, and appropriating the use of, the said pew, to Mr. Lane and his family, so long as he and they should continue parishioners and inhabitants of Lingfield—with the usual intimation.

Faculties appropriating pews in parish churches, to particular families, in different forms, and under different limitations, too lavishly granted by ordinaries in former times—the numerous exclusive rights to particular pews, vested, or supposed to be vested, in particular families, to which this has given rise, nuisances to parishes at large—it is the duty of ordinaries to prevent, so far as may be, their continuance or increase, by treating all applications for such faculties with great reserve; and by suffering none to issue, but under very peculiar circumstances.

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An appearance was given to this citation, as well by the minister and churchwardens, as by a Mr. Kelsey, a parishioner of Lingfield, both as opposing the grant: and two several allegations were filed, *nominally*, on the part of both, but, really, on the part of Kelsey only: it being the purport of those allegations to set up an exclusive right to the pew sought to be appropriated, in Kelsey, as appurtenant to a mansion in the parish, called *Batnors*, which he, Kelsey, had then recently purchased. In point of fact, the minister and churchwardens took no step in the cause, during its pendency in the Court below, beyond that of a mere appearance to the citation; and which step they seem to have taken only as conceiving, somewhat erroneously indeed, that they were *bound to appear* to the citation. Kelsey's *second* allegation, I should say, was responsive to a plea filed, by Lane, in answer to the first; in which, not merely Kelsey's asserted prescriptive right to the pew was denied, but in which the pew was claimed as already appertaining to Lane, in virtue of his connection with the former proprietors of *Batnors*, even though no *faculty* should issue, as prayed. The question, so far then, was a question of right between Lane, and Kelsey; the minister and churchwardens neither interfering (except as already stated) nor being called upon to interfere. From the rejection, in part, of Kelsey's second allegation by the Court below, an appeal, as from a grievance, was prosecuted to this Court; which sustained the judgment of the Court below, but retained the principal cause, at the prayer of *both* parties. But the question here, in substance, is quite another question to that which was depending in the Court below: this Court having disposed, at once, of any *legal title* to



the pew set up on either side, in pronouncing its judgment upon the merits of the appeal. For it clearly appeared to this Court, at the hearing of the appeal, that, for reasons presently to be stated, neither of these parties had, though both were asserting it, any legal right whatever to the pew in dispute. The question *here* then became, and still is, not any question of *right*; it is merely whether the Court, in the exercise of a sound discretion, shall, or shall not, proceed to appropriate this pew, by its license or faculty, *ex gratia*, to the respondent, upon the grounds stated in, and pursuant to the tenor of, the original citation. From the instant of the question assuming this shape, namely, from the hearing of the appeal, it became the duty of the minister and churchwardens, (Kelsey withdrawing from the suit) to lay before the Court the facts necessary to guide its discretion upon such a question. This they have done, through the medium of two allegations; (the second, again, responsive to a plea filed by Lane, in answer to the first); and it now becomes the duty of the Court to state whether, upon a review of all the facts and circumstances brought to its notice in the evidence taken upon these allegations, this is, or is not, an application on the part of Mr. Lane, proper to be acceded to.

It appears, then, by this evidence, that Mr. Antony Faringdon, in the occupation, at that time, of a house and estate in the parish of Lingfield, called *Batnors*, of which he was also the proprietor, somewhere about the year 1709, made certain presents to the church; in return for which, the parish conceded to him, and his family, the exclusive use, and possession, of a certain pew in the church, being the identical pew which

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is the subject of the present proceeding. This is verified, in part, by the following order of vestry, made in the year 1709, extracted from the parish books under that year.

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“ Memorandum—In the year 1709, when the parish church of Lingfield, in the county of Surry, was new beautified, and a great many new pews added, it was agreed between the then churchwardens, parishioners, and Antony Faringdon, Esq., for, and in consideration, that the said Antony Faringdon, Esq., presented an altar cloth, and Mrs. Elizabeth Faringdon, wife of the said Antony Faringdon, presented a silver salver, for the use of the communion; that, therefore, the said Antony Faringdon, Esq., should have, and hold, for his own use, and the use of his family, a certain seat, or pew, adjoining the pulpit stairs.”

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Batnors continued in the possession of the Faringdon family, from 1709 to 1820; when a Mr. James Faringdon, its then proprietor, and the great grandson of Mr. Antony Faringdon, the first *grantee* of the pew, if he may be so called, sold the estate to Mr. Kelsey. Such was the origin of Mr. Kelsey's supposed claim. Now to that of Mr. Lane, Mr. James Farringdon, it seems, has two sisters—the one, unmarried; the other, the wife of Mr. Lane, who, I should say, is an attorney, in London. Up to 1820, the Faringdons are admitted to have had the exclusive use of the pew; in which, from the time of his marriage, in 1807, Mr. Lane, of

course, sat with his wife, occasionally, as a visitor at Batnors; but, I presume, as a visitor only. In 1816, indeed, some repairs were done to the pew, apparently at the expense of Mr. Lane: but he, Lane, at that time, was the actual mortgagee, and was in treaty for the purchase, of Batnors.

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Upon the sale of Batnors to Kelsey, in 1820, the question as to the (supposed) ownership of this pew, to which I have already adverted, immediately arose. Kelsey claimed it, as an appurtenant to the mansion; obviously without any legal foundation—as the facts stated, the order of vestry, &c., are conclusive against any annexation of this pew to Batnors, by prescription; a title, the only legal foundation of which is *immemorial* usage. On the other hand, Mr. James Faringdon maintained, upon equally untenable grounds, that the pew was still, absolutely, and exclusively, his—claiming it as the immediate descendant and representative of Mr. Antony Faringdon, the first donee; in which capacity, and not as the mere owner of Batnors, he insisted that the right had, all along, vested in him. Accordingly, he both claimed to occupy the pew, exclusively, during his continuance, for about nine months, in the parish, after leaving Batnors; and, upon finally quitting it, affected to convey, or assign, his interest in the pew to his brother-in-law, Mr. Lane; he, Lane, having purchased twelve or fifteen acres in the parish, upon which he had begun to build a house at that time, which has since been finished, and which he now inhabits. Such was the origin of Mr. Lane's asserted title, persisted in, (like that of Kelsey,) up to the hearing of the appeal: as, also, indeed, that the pew was *his*, in right of his wife, in virtue of *her* descent from

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Mr. Antony Faringdon, independent of any conveyance, or assignment, from his brother-in-law, Mr. James Faringdon; for this also was set up, in the allegation filed on his part, in the commissary of Surry's Court. I need scarcely say that, upon this shewing, Lane had no right to the pew any more than Kelsey. The last person who had a vested right to the pew, *of any description*, was Mr. James Faringdon: but even his right was a mere *possessory* right; as such it was liable to defeazance by the ordinary, and by the churchwardens, as officers of ordinary, even during his continuance in the parish: it ceased and determined, *ipso facto*, upon his ceasing to be a parishioner; when the pew reverted to the parish, at large, and became as liable as any other pew in the church to the disposal of the ordinary, and of the churchwardens again, in the first instance, still as officers of the ordinary. However, Mr. Lane, and Mr. Kelsey, mutually, assert their right to the pew, from the time of Mr. James Faringdon quitting the parish, in January, 1821; but without any *legal* step taken, till the month of June in that year—when Mr. Lane applies to the ordinary (the commissary of Surry) for a faculty, appropriating to him (or rather confirmatory *of* his alleged title to) the pew in question. The subsequent proceedings, both in the Court below, and in this Court, and the true state of the question here, have already been stated. It only remains to add, that Mr. Lane still insists that the faculty prayed should issue *ex gratia*, though he no longer claims it, *ex debito justitiæ*, as, partly at least, in the first instance; submitting, also, that it *may* issue, as prayed, without any prejudice to the parish. The minister and churchwardens deny this; maintaining, that a grant of the

faculty prayed (of the validity of Mr. Lane's pretensions to which they leave the Court to dispose) would be manifestly inconvenient—as with reference, this, to the increasing population of Lingfield, and even to the present want of accommodation for those who are authorized, and disposed, to attend divine service at its parish church. Such have been the several proceedings up to the present time—such are the cases severally undertaken to be made—and such is the whole question of which the Court has now, finally, to dispose.

The general law, with respect to pews and sittings in churches, is little understood; erroneous notions on this subject are current, at least, in many parts of the country, and have led to much practical inconvenience. It is necessary that the Court should briefly advert to these topics; in order to dispose, intelligibly to the parties, of the question at issue.

By the general law, and of common right, all the pews in a parish church are the common property of the parish: they are for the use, *in common*, of the parishioners, who are *all* entitled to be seated, orderly, and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, and subject to the control, of the ordinary. Neither the minister nor the vestry, have any right whatever to interfere with the churchwardens, in seating and arranging the parishioners, as often erroneously supposed: at the same time, the advice of the minister, and even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens; and to a certain extent, may be reasonably deferred to, in this matter. The general duty of the churchwardens is to look to the general

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accommodation of the parish, consulting as far as may be, that of *all* its inhabitants. The parishioners, indeed, have a claim to be seated, according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of *all* the parishioners *to be* seated, if sittings can be afforded them. Accordingly, they are bound, in particular, not to accommodate the higher classes, beyond their real wants, to the exclusion of their poorer neighbours; who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation; supposing the seats to be not all equally convenient.

Such, then, are the *general* duties of churchwardens, in seating and arranging the parishioners in their several parish churches. But the actual exercise of their office, in this particular, is too frequently interfered with, by *faculties*, appropriating certain pews to certain individuals, in different forms, and with different limitations; and, by the *prescriptive rights* to pews *of* which these faculties have been the occasion. Faculties of this description have, certainly, been granted, in former times, with too great facility; and, by no means, with due consideration, and foresight. The appropriation has, sometimes, been, to a man and his family, "*so long as they continue inhabitants of a certain house in the parish.*" The more modern form is, to a man and his family, "*so long as they continue inhabitants of the parish,*" generally. The first of these is, perhaps, the least exceptionable form. It is unlikely that a family continuing in the occupation of the same house in the parish, shall be in circumstances to render its occupation of the same pew in the church, very

objectionable. The objection which applies to the other class of faculties is, that *they* often entitle parishioners to the *exclusive* occupancy of pews, of which they, themselves, are no longer in circumstances to be *suitable* occupants at all, whatever their ancestors might have been. A third sort of faculty, not unusual after churches had been new pewed, either wholly or in part, appears to have been, a faculty for the appropriation of certain pews to certain messuages, or farm houses; the probable origin (the faculties themselves being lost) of most of those *prescriptive rights* to particular pews, recognized, as such, at common law—the parties claiming which must shew the annexation of the pews to the messuages, *time out of mind*; and the reparation, from time to time, of the particular pews, by the tenants of such houses or messuages, in order to make out their prescriptive titles. Some instances there are, too, of faculties *at large*; that is, appropriating pews to persons, and their families, without any condition annexed of residence in the parish. But such faculties are, so far at least, merely void, that no faculty is deemed, either here, or at common law, good, to the extent of entitling any person who is a non-parishioner to a *seat* even, in the *body* of the church. As to an aisle, or chancel, that, indeed, *may* belong to a non-parishioner; for the case of an aisle, or chancel, depends upon, and is governed by, other considerations. But whenever the occupant of a pew in the *body* of the church ceases to be a parishioner, his right to the pew, howsoever founded, and how valid soever during his continuance in the parish, at once ceases, and determines; though the contrary is very often supposed; as, for instance, that he may sell, or assign it, or let it

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to rent, as part and parcel of his *property* in the parish. So, again, of pews annexed by prescription to certain messuages, it is often, erroneously, conceived that the right to the pew may be severed from the occupancy of the messuage: it is no such thing; it cannot be severed: it passes with the messuage; the tenant of which, for the time being, has also *de jure*, for the time being, the prescriptive right to the pew. The result, upon the whole, however, of these faculties, is, that in many churches, the parishioners at large are deprived, in a great degree, of suitable accommodation, by means of exclusive rights to pews, either *actually* vested in particular families, by faculty, or prescription; or, at least, and which is the same thing as to any practical result, *supposed to be* so vested. I add this last, because, in very many instances, these exclusive rights are merely suppositious; and would turn out, upon investigation, to be no rights at all. In this very case, for instance, there are two claims, as of right, set up to this identical pew, neither of which, it now seems, is legally valid; I mean Kelsey's asserted *prescriptive* right, and that of Mr. Lane, derived *through* the Faringdons; whose right itself was a mere *possessory* right, that actually ceased and determined upon Mr. James Faringdon ceasing to be a parishioner, in 1821.

With this *experience* of the mischief that has resulted from a too lavish grant of these faculties in *former* times, it is the duty of the ordinary to prevent its recurrence by proceeding in this whole matter with the utmost prudence and circumspection. It is especially, this, incumbent upon every ordinary looking to the *times*—with which he is bound to keep pace, in all matters appertaining to his jurisdiction, so far as the



same is compatible with his positive duties. Faculties of this sort might issue, a century or two ago, without much, or without any, impropriety; the issue of which, at the present day, would be in the highest degree improper. The population of the country, throughout, has immensely increased of late, and is still increasing. Dissent from the church, too, especially among the lower classes, has also increased—and partly, no doubt, from the lower classes being indifferently accommodated with church room, and even being precluded, in many instances, from attending divine worship in their parish churches at all. It is to remedy this want of church room, which is much felt *generally*, that parliament has granted the vast sum of a million and a half, expressly for building new churches. By aid of this parliamentary fund, ninety-eight churches have already been built—accommodation has already been provided for 150,000 persons—and the present applicants for similar accommodation, by means of similar aid, are probably as many more. Large funds have also been raised, in the way of voluntary contribution, by a society for enlarging churches: 370 parishes have been assisted, accordingly, at an expence of 80,000*l.*; and 110,000 additional sittings in churches have actually been provided. The funds, too, of that society are failing, though new calls upon them are still being made. In the actual expenditure of the funds to which I have just alluded, attention has been paid, in both instances, to the accommodation of the *poor*, no less than to that of the higher, and middle, orders of society. In the new churches, to be built by aid of the parliamentary funds, a fifth, at least, of the room was positively to consist of free sittings for the

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poor, by an express provision of the legislature: practically and in fact, a third of the room, taking the new churches throughout, has consisted of free sittings. Of the additional sittings, again, to be provided by aid of the church-enlarging society, it was a condition expressed that one half should be free sittings. But here, again, practically and in fact, the proportion of free sittings to the other has been still greater; for, of the 110,000 sittings actually provided, 80,000 are free sittings; about three-fourths of the whole. These are strong features of the times in this particular—of the want of church room, generally, and of the propriety of affording additional church room, especially to the poor; and they are not to be overlooked by ordinaries, when applied to on occasions like the present, for obvious reasons. With respect to the poor, indeed—every possible reason exists why no concessions should be made at all likely to infringe upon the due accommodation of the poor, in their several parish churches. It is to be presumed that they are the persons most in want of religious instruction; and their title, as such, in particular, to receive it, is expressly recognized by the divine founder of Christianity himself. If disabled from receiving it, by want of room in their parish churches, they are almost *driven* to seek it in places of dissenting worship—a circumstance exceedingly to be deplored; although they are clearly entitled, and should freely be allowed, to resort to such places of worship if they prefer it; provided, that is, they are *really* dissenters, in opinion, from the doctrine, or discipline, of the church.

Following then the times, and taking all these circumstances into due consideration, a strong case

should be made out to induce the ordinary, in the exercise of a sound discretion, to appropriate any pew; by faculty, to a particular parishioner, and his family, at the present day. True it may be that, at the particular time when the faculty is applied for, its issue may not be generally inconvenient: the parishioners at large may be sufficiently accommodated after, and notwithstanding, its issue. But in this even, the most favourable, case, there are obvious reasons for inducing the ordinary to entertain such applications with a good deal of reserve. For instance, additional room may be soon, or at some time, wanted, suggesting the propriety of new arrangements in the church: but such future arrangements may be formidably obstructed by the actual issue of the faculty then prayed; being, as it is, if once issued, good and valid, even against the ordinary himself. This consideration alone, might well induce the ordinary to pause, when applied to for a faculty of this nature, though no *present* inconvenience should seem to result from its concession to the applicant.

What then, in the first place, is the case set up by Mr. Lane, to induce the ordinary to grant him, *ex gratiâ* the permanent, and exclusive, possession of this particular pew? I say *ex gratiâ*; for as to any claim of right, *that* he has abandoned. It appears to me, by no means, a strong case. It is founded, merely, upon his connexion, by marriage, with a family, one of the members of which, more than a century ago, presented the parish with a pulpit cloth, and a silver salver, said (the latter) to be still in use. But in return for this, in itself no very splendid, benefaction, the head, and representative of that family, has had the *exclusive* use

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and possession of this pew, perhaps the best in the church, for more than a century, until the sale of Batnors, the family mansion, in 1820. The parish account with the family, on the score of that benefaction, seems to me to be fairly balanced. Mrs. Lane's claims, as a descendant of the original donee of the pew, are of the very weakest description. She married, and quitted Lingfield in 1807; and she was domiciled with her husband in London, having no connexion whatever with Lingfield, except as an occasional visitor at Batnors, for fifteen years. At the expiration of that time, Lane becomes a parishioner: but he is a new settler, a *novus homo*, to all intents in the parish: it is extremely doubtful even whether he *was* a parishioner, at the time when the citation issued which is the foundation of this whole proceeding: he is the tenant of a house scarcely begun to be built at that time: he is entitled, most undoubtedly, to *suitable* church room for himself, and his family; to the *best* which the circumstances of the parish will afford him, without prejudice to other parishioners. But as reasons for inducing the ordinary to allot him, *ex gratia*, the exclusive and permanent possession of this particular pew by a faculty, the case set up on his part would, under any circumstances of the parish, be, in my judgment, extremely feeble.

But how, secondly, is the parish circumstanced in this particular? What, I mean, is the population of the parish in proportion to the number of sittings in the church, and is it an increasing, or a diminishing, population? These are necessary enquiries, previous to *any* grant of a faculty of this description; but they are most necessary, and the result should be most

satisfactory, in favour of *such* an applicant, to ensure the success of his application. The size of the pew, too, and the proportion of the number of sittings in the pew to that of the applicant's family, are *also* to be taken into the account. It remains to state the result of the evidence on these several particulars; which I think decisive against the application.

In the first place, then, this pew is one of the largest in the whole church, in point of capacity—it appears, I think, that there are only three pews in the church as large, and that there are none larger. It is capable of holding ten or twelve persons, according to Lane's own witnesses; and twelve or fourteen, according to several witnesses examined on the part of the parish. Mr. Lane's family, however, consists of six persons only, including a Miss Faringdon, the wife's sister, and said, at present, to be domiciled with Mr. Lane.

Next, as to the capacity of the church to accommodate *all* the parishioners. The parish church of Lingfield appears to be an old collegiate church, with three chancels as they are called, or more properly aisles: the number of pews in these aisles is twenty-three—but the aisles themselves, and the pews in them, are the mere private property of three several parishioners, who keep them in repair; and the sittings in these aisles are not open, in any sense, to the *general* accommodation of the parishioners. The number of pews in the church is sixty-six; capable of containing, according to the evidence, from six, to eight, persons, each, on an average. But the population of Lingfield is fixed at 1770, and the number of families at 325, by authentic documents. Consequently, there are nearly five times as many families, as there are pews, in the *body* of the church; and the

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pews in the body of the church (the only part of it in question) to contain the *whole* population, should be capable of holding twenty-seven, instead of seven, persons, each. Hence, though sittings in the church may not be necessary for the whole population; and though it may not be necessary, again, that each family should have a separate pew, yet still the result is, that there can be no superabundance of church room; which Mr. Lane undertook to shew, but, in which, in my judgment, he has failed. The same inference results from the present *arrangement* of the church, as I collect it from the evidence. Every part of the body of the church is filled with pews; nor do I understand that there is any accommodation for the lower classes, *out* of the pews, but certain benches in the aisle, appropriated, in part at least, to a Sunday school. This is a large, agricultural, parish; the labourers, however, (many, perhaps, aged and infirm) should seem to have no free seats, with backs, to which they can resort with convenience, to attend divine worship in the church. It also appears, that several heads of families (respectable farmers) sit together in *one* pew: their wives, and families, (in one instance to the number of seven) in another, separate, pew. This again suggests that the parish is driven to shifts for want of church room. It is a matter of feeling with many to perform their religious duties by the sides of their wives, and families. It is matter of practical benefit, so far as may be, to indulge this feeling. Parents, in that case, are more attentive, as setting an example to their children; who are likely to be, and, undoubtedly in many instances, are, benefited by that example. As a matter, therefore, both of feeling, and practical advantage, families should be

seated *together* in church, where this can be done; and its not being done in this instance, suggests, like all the rest, that this parish church of Lingfield is, even at present, *unequal* to the fair general accommodation of the parishioners.

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But a subject of enquiry, not unimportant, still remains. Is the population of this particular parish an increasing, or a diminishing, population? For this is, obviously, a material consideration. Now upon this head, the Court is left in no doubt. It appears by the evidence of Sir Thomas Turton, an old parishioner, and Mr. Lane's own witness, that, in about thirty years, the population of Lingfield has nearly doubled itself; increasing, in that time, from 900, to 1700, persons. It is still, too, a rapidly increasing population, as results, both from the evidence, and from the strong probability of the thing. I allude, as well to the easy distance of Lingfield from the Metropolis, as to the several villas, &c., said to have been recently built, and to be now building, in the parish. The very situation indeed of Lingfield, independent of any evidence, renders it utterly improbable, that whilst the population of the country, throughout, is, as it is, on the increase, that of this particular place, of all others, should be on the decline.

Upon the whole, then, I am of opinion, for the reasons stated, that the present is, by no means, an application, which the ordinary would be justified in acceding to: taking into consideration, the merits (so to call them) of the applicant, and the circumstances of this parish in the particulars to which I have just been adverting. And this I do, without, at all, meaning to say, that no *possible* case may arise in which a faculty of this description might be issued,

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with great propriety, even in these times. For instance, a parishioner might well, possibly, entitle himself to such a faculty, by contributing, liberally, to the enlargement, or even the new pewing, of his parish church; in order to furnish additional accommodation for his fellow parishioners, and especially, free seats for the poor—a matter, this, which may soon be called for in this particular parish of Lingfield, and would perhaps be very proper, even now, upon some considerations which have already been stated. A benefactor of this description might have strong claims to a faculty of the kind now prayed. But even the claims of such benefactors should be duly weighed by ordinaries; and the indulgence sought by them should be fettered with all due restrictions and limitations. For instance, in allotting them, by faculty, good, or even the best, sittings; ordinaries should be careful, at the same time, not to afford them a too great proportion of room; or one exceeding their real (actual and probable) wants, to the exclusion of other parishioners: for *that* would be justifiable under no circumstances. In short, I repeat, that it is the ordinary's duty, keeping pace with the times, to proceed in this whole matter, at the present day, with the utmost care, and circumspection.

In respect to costs, of which something was said in the argument—the Court is disposed to make no order upon costs, in favour of either party. Of the original litigants, both were in error. From the time, indeed, of the appeal heard, when the Court intimated its opinion that Mr. Lane had little chance of obtaining a faculty, but in the event of the circumstances of this parish being just the reverse of what they appear to the Court to be, on the evidence, I think, that Mr. Lane



should have desisted from his application. From that time, too, it became the duty of the minister and churchwardens, the parties cited specially, and particularly of the latter, *ex officio*, to put the Court in possession of those facts, and circumstances, necessary to guide its discretion in the premises; and upon which it has just decided that this application is not one of a nature fit to be acceded to. But, in the hope of promoting conciliation, and with a view to give a triumph to neither party, I am not disposed to accompany the refusal of a faculty in this instance, with any decree against Mr. Lane, for costs. As to the costs of the opposition, those, I am clearly of opinion, should be borne by the parish from the time of the hearing of the appeal. Up to that time, the opposition proceeded upon the ground of a particular parishioner's (Kelsey's) asserted right to the pew; a question in which the parish had no concern whatever. I must presume it to have been matter of indifference to the parish to which of these parties, if to either, this pew, of right, exclusively belonged. Up to that time the parish, then, may reasonably decline; and leave the costs of the opposition to be defrayed by Kelsey alone

The churchwardens may, possibly, wish to know what the Court would recommend to be done, on their part, with respect to this pew, now ascertained to be at their disposal. Certainly not to *seat* either Lane, or Kelsey, exclusively in the pew. Their claims to be seated in it, perhaps, are pretty equal. Lane, from his marriage into the Faringdon family, may have contracted a something of attachment to the pew, not improper to be gratified, to a certain extent, and within reasonable limitations. Kelsey, on the other hand, as the *now* proprietor of Batnors, the owners of which, for

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the time being, have *exclusively* occupied this pew for more than a century, may have just reason to complain (at least probably in his own opinion, and in that of *many* of his fellow parishioners) if actually, and altogether, dispossessed of it. Not that there are not certain grounds of *expediency* which would excuse, or even justify the churchwardens, in declining to seat either of these parties in this particular pew. There are, doubtless, parishioners whose claims to be seated in it are superior to those of Mr. Lane, a new settler, abstract from his connexion with the Faringdons; which has nothing to do with his being seated in this pew, *de jure* at least. And with respect to Kelsey—*generally speaking*, most undoubtedly, churchwardens act more correctly in allotting vacant pews to such parishioners as have the best claim to them in point of standing in the parish, and general respectability, rather than to those who happen to succeed as tenants of the houses inhabited by the late occupiers of those pews. The occupancy of pews being thus altered, from time to time, according to circumstances, is the best provision against the birth or growth, of those prescriptive rights to pews, as *in* certain families, or annexed to certain messuages, the existence of which, I have said, is so injurious to the general interests of the parishioners. But the present proceedings may have rendered this unnecessary, as a measure of precaution, in the *present* instance. Supposing it not to be, and that no other good objection applies to the proceeding now about to be recommended, I see no reason why the present churchwardens should decline allotting this pew to Mr. Lane, and Mr. Kelsey, jointly, or in common. It is sufficiently roomy, according to all the evidence, to accommodate both families. But should

the parties in question, unfortunately, be on such a footing as to render their common occupancy of one and the same pew grating to the feelings of both, or either, it may not, perhaps, under the circumstances, be quite improper, that the churchwardens should convert this into two pews. Each of such pews would be capable of holding five or six persons. Mr. Kelsey might be seated in the one of these pews, and Mr. Lane in the other. To this *it should seem* that there could be no reasonable objection; although of the exact state of the parish, in all its details, the Court is not in possession of sufficient information, to be enabled to form a very decided opinion on this part of the case. It can only, therefore, in conclusion, recommend the churchwardens, *generally*, to act impartially in the premises between *these*, and *all* parties; subject to the principles just laid down. In the performance of this part of their duty, they will be assisted by the advice, though they are not governed by the authority, of the minister.

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IN THE PREROGATIVE COURT OF CANTERBURY.

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CAMBIASO v. NEGROTTO.

1st. Session.

(*On Motion.*)

IN this case administration with the will annexed of a Genoese subject had been decreed to the committee of a lunatic, the residuary legatee named in the said will, *Quere* whether, even on grants of administration to foreigners, of the property of foreigners, *generally*, the administrator is not compellable to give bond *here*, in *England*, with two sureties, *British subjects*, for the due administration of the effects.

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(there being no executor), for his use and benefit. The parties interested in the effects, apparently, were all Genoese subjects; all resident at Genoa. A question however had been mooted, whether the committee were not compellable to give bond with two sureties, British subjects, here in England, for the due administration of the effects, in the usual penalty—namely, in the double amount of the effects to be administered—such sureties to *justify* (this being also, in the particular case, *further* requisite). And the Court had expressed itself as strongly inclined to doubt, whether a mere bond given at Genoa, with *Genoese* sureties, (parties wholly out of its reach and control) would be that “*sufficient bond*,” which the ordinary is required to take, on grants of administration, by statute 22 and 23 Car. II. c. 10.

Some arguments had been addressed to the Court by counsel on a preceding Court-day, against the necessity of compelling the administrator to give bond, &c. *here*, at least in the present case; which was under special circumstances: (a) as with reference to which,

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Now said, that it should dispense with sureties being found in this country in the particular instance: intimating, at the same time, considerable doubts, whether it ought not to require this, in cases of foreign grants, *generally*.

(a) For instance the party deceased had died testate: so that the bond was not exacted by force of 22 and 23 Car. II. c. 10. The party too had been dead upwards of seventeen years: so that the creditors, probably, were all satisfied. Lastly, the committee was the lunatic's eldest son. so appointed by the Courts of Genoa; who, probably, had taken bond for the faithful discharge of his duties, &c., &c.

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BROGDEN v. BROWN.

4th Session.

**THIS** was a question respecting the legal validity of a testamentary paper, propounded as the last will and testament of Mary Jones, deceased. It was opposed as by reason, that the deceased was not of testamentary capacity, at the time when the paper was executed. The circumstances of the case are fully stated in the judgment: in which the Court distinguished cases of *delirium* from those of (proper) *insanity*; especially in respect of the much greater ease with which a *lucid interval* is proveable in a case of *delirium*, than in one of (proper) *insanity*. At the same time, the Court also distinguished between the much greater proof of capacity which it is necessary to sustain an "*inofficious*" testament; and the much less, which is sufficient to establish a will consonant with the testator's natural affections and moral duties; especially being either his own *sole* act, or one, his coadjutors in which are parties who themselves take no benefit under it.

JUDGMENT.

Sir JOHN NICHOLL.

The Court has been reminded, not improperly, that it has no power to make wills for parties—in other words, that, however consonant to reason and justice, any paper propounded as a will may be, in the Court's view of it, it must still appear to be, in substance and effect, the very act and deed of the *deceased*, and of no other person or persons whatsoever, acting in the name and on the behalf of the deceased, how well

Lucid intervals are much easier to be proved, as they are much more likely to occur, in cases of *delirium* than in those of (proper) *insanity*. And proof of much less capacity is sufficient to sustain a testamentary paper of an "*inofficious*" character procured through unsuspected agency, than is necessary to sustain a testamentary paper of an *opposite* description in those particulars, one or both. The rule, that where capacity is at all doubtful, there must be direct proof of instructions, only applies, with any degree of stringency, where the instrument is "*inofficious*"; and obtained through parties whom it purports, materially, to benefit.

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soever intentioned, to be entitled to probate as that for which it is propounded, namely, a valid will. To this, as a legal principle, the Court readily subscribes. Assuming the instrument now propounded to be, intrinsically, of the character described in the Court's view of it, is there, or is there not, sufficient, on the evidence, to satisfy the mind of the Court, *under all the circumstances*, that the *factum* of that instrument is justly to be ascribed to the alleged testatrix in the cause herself? This is the question, and the *sole* question, to which the Court has to address itself.

Mary Jones, the alleged testatrix, died on the 13th of June, 1823. The will propounded bears date on the 12th June, the day preceding, on which very day the deceased lost her only child, a daughter, aged about ten years. The mother and child had sickened with the same disorder, on the same day, about ten days preceding; which terminated in the deaths of both, on the 12th and 13th days of June, as I have just said. She had been a widow some years.

The deceased left a father, John Brown, party in the cause, the (*nominal*) opposer of the will; being the only person entitled to her personal estate and effects if dead intestate in law. She also left a brother, Edward Brown, and a sister, Ann M'Gregor—not, however, of course, parties entitled in distribution, as a father was, and is, still living. Mr. Brogden, who propounds the will, as sole executor, is a brother-in-law, having married a sister, pre-deceased. The widow, Ann Brown, of John Brown, a brother also pre-deceased, is an attesting witness to the will. The father of the deceased is far advanced in life, and, to say the least, of very doubtful capacity. He appears to have been

repeatedly under superintendence as a person *non compos mentis*. From June, 1819, to June, 1823, when his daughter died, he was so placed in lodgings, at Hatfield. It is only *upon* that event that he is removed to the house of his son, Mr. Edward Brown, in the neighbourhood of London; plainly, I think, by way of colour, and merely in order to the present suit. The real instigator of that suit, is the son; though it is *necessarily* instituted in the name of the father; he being the sole person who has any *apparent* interest to establish an intestacy.

Next as to the *contents* of this will. It is a will, under which Mr. Brogden, the sole executor, and who propounds it as such, takes no interest, and derives no benefit whatever. It bequeaths the property to him, in *trust* for the father, to the extent of 45*l.* per annum; the surplus interest or produce, *if any*, to the brother and sister, in equal division: and the principal, to the same brother and sister, also in equal division, on the death of the father. The only property not so disposed of is 50*l.*, which Mr. Brogden is empowered by the will, to distribute to such persons as *he* chuses to remember, on behalf of the testatrix. Such is the will. Of Mr. Brogden, who propounds it, it may be sufficient to say, without entering into particulars, that his conduct to this whole family from his first connection with it—to the father, and to *each* of the children, and to no one of them more than to this Edward Brown, his *real* opponent on the present occasion—has been more than merely upright or honourable; it has been generous, and benevolent, in a very uncommon degree. He was also the sole executor, *in trust*, of a will made by the deceased in 1822, in favour of her child; in

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which, as in that now propounded, he had no interest, and took no benefit. It was necessary to say thus much of the character and conduct of Mr. Brogden, being such as I have described, for the following reason. This circumstance, and that of his being a party purely disinterested in the event of the suit, are material features in a cause of the shape and complexion which this cause has assumed. It is difficult to conceive fraud, or circumvention, both of which are imputed in this cause, to a party, where there is not only no apparent motive for these, but where the whole conduct of the party to whom they are imputed so strongly negatives the imputation, as it clearly appears, by the evidence, to do, in the present instance.

The ground of opposition taken is, *that* the deceased, at, and about, the whole time when the will purports to bear date, was *delirious*; and was rendered incapable thereby of making and executing a will, or of doing any other act of that, or the like, nature, requiring thought, judgment, and reflection. That she was, *at times*, delirious, for the last three or four days of her life, (a period covering the whole transaction of this will) I may say, at once, is indisputable upon the evidence.

The case then set up in opposition to the will is, confessedly, one of *delirium*, as contra-distinguished from fixed mental derangement, or permanent proper *insanity*. Now the two cases, however similar in some respects, are still distinguished, each from the other, in several particulars; and in no one particular more, than in the greater comparative facility of proving a *lucid interval* in the one, than in the other, case. A principal reason of this is the following:—In cases of



permanent, proper, insanity, the proof of a lucid interval is matter of *extreme* difficulty, as the Court has often had occasion to observe, and for this, among other reasons; namely, *that* the patient *so* affected is, not unfrequently, *rational* to all *outward* appearance, without any *real* abatement of his malady: so that, in truth and substance, he is just as insane, in his apparently rational, as he is in his visible raving, fits. But the *apparently* rational intervals of persons, merely delirious, for the most part, are *really* such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of which, to be ascertained by the *appearance* of the patient, the patient is, most commonly, *really* sane. Hence, as also, indeed, from their greater, presumed, frequency in most instances in cases of delirium, the probabilities, *a priori*, in favour of a lucid interval, are infinitely stronger in a case of delirium, than in one of permanent, proper, insanity: and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held, by this Court.

It appears by the evidence that, on Tuesday, the 10th of June, [1823], the deceased, then for the first time conceiving herself seriously indisposed, sent a message to Mr. Brogden, earnestly requesting to see him *immediately*. He came to her, about five or six o'clock. The deceased received him with evident satisfaction; and they were left *alone* together, for about two hours. After he was gone she told the witness who deposes to this, a Miss Bromhead, that she should now die happy—that she had made provision for her dear little girl, whom Mr. Brogden had promised to educate at home, without sending her to a

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school, of which she expressed a great dislike; and that she "knew she could rely on his word."

In the evening of Wednesday, the deceased was visited by Dr. Uwins; both her own condition, and that of her child, having, at that time, become extremely alarming. On the following day, a second physician, Dr. Chalmers, was also called in. He saw the deceased (the mother) about four o'clock: but the child was dead; having died about two o'clock on that day. That event was attempted, or affected, to be concealed from the mother; but she *must* have known it; and there are plain indications in the *evidence* (quite independent of those certain ones, to be collected from the tenor of the instrument now propounded,) that she *was* fully aware of it.

Now the evidence of Dr. Uwins is to this effect. He says that "on the Wednesday evening, and on the morning of Thursday, the deceased was clearly capable of any business: she was of sound mind, and capable of giving instructions for, and making and executing, her will, though in a state of high nervous irritation," (produced, as he had before deposed, rather by anxiety for her child, than by the degree of fever *then* upon her). When the deponent *again* saw her on that day, in company with Dr. Chalmers, namely, about four o'clock, he "considers it to be *doubtful* whether she was capable of doing so, or not: his opinion *rather* is, that she was *not*: there was increase of fever: delirium shewed itself, *decidedly*: she could, and did, answer questions, rationally, and sensibly, when her attention was fixed; but, there was a confusion in her mind, and an inclination to ramble, when her attention was not excited, and fixed, by questions addressed to her."

He says that when he saw her once or twice, (he forgets which) *afterwards*, "she was quite delirious and clearly incapable:" *but* he adds that he cannot depose to her incapacity, at intervals between his visits: "it is not *improbable* that she might have had lucid intervals," though she was delirious and irrational at the particular period, or periods, of his visit, or visits, to her.

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The evidence of Dr. Cholmely, an *opposing* witness, is, on the whole, less favourable: but he saw the deceased only *once*, for about a quarter of an hour, in the afternoon of the 12th, at which time her agony *as to* the state, or rather *for* the death, of her child was, probably, at its height. He, indeed, conceives her, at the time of his visit, to have been "quite incapable of any complicated act; undoubtedly, of any thing that required fixed attention, or any exercise of mental faculty." Yet even Dr. Cholmely admits, that "her attention being strongly roused, she could command it so as to answer simple questions;" and there is nothing whatever, even in his evidence, to negative the probability of a lucid interval, of fully sufficient length to cover the whole transaction, the history and real character of which is about to be investigated.

But the Court has also the evidence of a third medical practitioner, Mr. Rolls, to this part of the case; and to what does that amount? In brief, to this—that her *delirium* was solely produced by those severe paroxysms of bodily pain suffered by the deceased, from time to time, during the last three days of her life; and that this effect subsided with the cause—so that the one was, at no time, *scarcely* perceptible, but

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when the other was in actual operation. This deponent fortifies his opinion by references to *much* that was *said*, and even to some things that were *done*, by the deceased, during the last forty-eight hours of her life, inferring her *perfect* capacity: and, although of an inferior rank in the profession to the two other medical gentlemen, of whose evidence I have already disposed, yet I am to recollect that Mr. Rolls is, by no means, the witness whose testimony should weigh *least* with the Court upon this particular question, for the following reason. He had been acquainted with the deceased for years; and seems to have attended her, throughout the whole of her last illness, with uncommon assiduity: whereas Drs. Uwins, and Cholmely, were perfect strangers, until their introduction to her under the distressing circumstances just alluded to; and were much less likely, therefore, to form a true estimate as to the real state of her mind, and its capacity to the act in question, than her apothecary, Mr. Rolls.

Such, then, is an outline of the general evidence as to capacity: next for that to the act itself; I mean, as to the *factum* of this will.

It appears by this evidence that, on the evening of Thursday, Mr. Brogden again called on the deceased with a will which he had prepared for her to execute, from instructions which she is *pleaded* to have given him on the preceding Tuesday. It is *proved* that he was again left alone with the deceased, for more than an hour; and it is *pleaded* that, at *this* interview, he received instructions for the new will—that which he had brought with him being, necessarily, abandoned in consequence of her daughter's death: and, *that* Mr. Brogden went into another room, and prepared a will

accordingly; which is admitted to have been presently executed by the deceased, as I shall state in the sequel, and to be the identical paper propounded.

Now, Mr. Brogden being party in the cause, and the sole person present at the giving of the instructions *pleaded*, the *fact* of any instructions being given is one, plainly, incapable of any *direct proof*. But instructions may be presumed, from the conduct of the party to whom they are pleaded to have been given, and from that of the several other parties engaged in the same general transaction, *at the time*, without any *direct proof*; and this, if any, is precisely the case in which that presumption may safely be acted upon. The rule that, where capacity is at all doubtful, there must be *direct proof* of instructions, only applies, or at least only applies with any degree of *stringency*, where the instrument is *inofficious*, or where it is obtained by a party materially benefited; or, *a fortiori*, where it is both. It has really no application to a will prepared by an agent, purely disinterested, and whose character for perfect integrity and benevolence stands so high as that of Mr. Brogden: and of which, at the same time, the dispositive part is so just, and so proper, so consonant to the deceased's natural affections and moral duties, that it speaks for itself, and carries, upon the face of it, its own recommendation. Such an alleged will, if *suggested*, the Court may readily presume that the alleged testator would acquiesce in, and adopt, if not wholly deprived of consciousness: and mere acquiescence and adoption, in such a case, would so compensate for any want of *direct evidence* of instructions given, *a priori*, that proof of these alone, in conjunction

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with proof of almost any, whatever, *glimmering* of capacity at the time of the execution, would be good to support the will; and would *sufficiently* indicate mind, and volition, to justify a Court of probate in pronouncing for it as a genuine, and valid *will*, in my judgment.

The application of these principles to the case before the Court, will render the conclusion at which it is bound to arrive upon it, inevitable. In the evidence, as to general capacity, I have already said, that there is nothing whatever to *negative* the probability of *full* capacity, at least at intervals; quite the contrary. I come then to the act of execution—and what does the evidence as to that suggest; or at least the only part of it upon which the Court can place the slightest degree of reliance? It furnishes *full* proof of mind, and volition, on the part of the deceased; and, as fully, negatives all suspicion of any unfairness, on the part of Mr. Brogden, in the whole conduct of the transaction. The preparation of the will being completed, he returns with it to the deceased's bed-room: it is then, and there, read over to the deceased (an admitted fact) in the presence of this Edward Brown, the brother, of Ann Brown, the sister-in-law, and of a young woman in the deceased's service, named *Robson*, the two last *attesting* witnesses. The deceased is sitting up in bed, without support; in great affliction, no doubt, but perfectly calm, and with nothing whatever in the evidence, entitled to one jot or tittle of belief, to suggest to my mind any appearance even of wandering, or delirium, at that time. The will is then put before her, which she subscribes, in her usual form, with a dash below: and

with the attestation of the instrument, by Robson, and Mrs. Ann Brown, the transaction terminates. Of these attesting witnesses, Robson, the one, speaks to *full* capacity. The deposition of the other, Mrs. Ann Brown (as well as that of Mr. Edward Brown, a present, though not an attesting, witness) tells a different story: but in the conduct, *at the time*, and long after, of both these witnesses, (of the attesting witness, especially) the Court has evidence of the same tenor with that furnished, *both* by the conduct at the time, and by the present testimony, of Robson, too firm to be shaken by any opinions which *they* now venture, pretty unreservedly, to express, that the deceased, at the period of this transaction, was delirious, and incapable. As to Ann Brown, she is a witness deposing against her own *act*: she attested the will, not taken by surprize, but with a perfect knowledge, I must presume, of the true tenor, and import, of that attestation, and of what the Court is bound to infer from it; as well as from her conduct in the premises, as it appears in the evidence, *long after*. For instance, both this witness, and Edward Brown, were not only present at the reading over, and actual execution, of the will, but they were both present, at a *second* reading of the will, after the deceased's funeral: still, no objection, whatever, on the score of that incapacity of the deceased which they now both depose to, was intimated by either of those persons, at either of those occasions; or, I repeat, till long after, that I am able to discover. Again, ten days after, Mr. Brogden is sworn, *as* executor; no *caveat* in the goods of the deceased has been entered in that interval; all parties are acquiescing. Ann Brown takes a donation, in the

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nature of a legacy, *as* under the will (*a*). As executor, Mr. Brogden administers the effects; converts the property; contributes to the father's maintenance. At last, however, probate is prevented from *actually issuing*, by a *caveat*: and Mr. Edward Brown, dissatisfied, as it should seem, at the executor's not chusing to suffer him to appropriate a chest, full of china and other articles, to which he had, or laid, some claim, thinks fit to institute this suit in the name of his lunatic, or at least, imbecile, father; in which he *is*, himself, (in effect, produces himself *as*) a witness to the deceased's incapacity; against the uniform tenor, as already explained, of his whole conduct persisted in up to that time; from which the Court is bound to infer that the deceased had capacity, and that the will is valid. As for his sister-in-law and fellow witness, Mrs. Ann Brown, what may have induced *her* to take a similar part upon this occasion, it would be useless to conjecture. Not only is *her* present deposition, neutralized, to say the least of it, by her prior conduct in the premises, but *she* is directly, and positively, contradicted as to facts which she has deposed to, (one in particular) in a manner, which, with the rest, leaves her unworthy of the slightest belief. She says, that, in the course of the day on which the deceased died, she, the witness, having mentioned to Dr. Uwins that the deceased had made a will on the preceding evening, he, Dr. Uwins, replied, "Oh, that's of no more use than a piece of "brown paper:" this in the presence of Mr. Rolls. Now, Dr. Uwins positively denies having made any observation of the sort, to any person whatever, at any

(*a*) Viz. out of the 50*l.* left, as said above, to Mr. Brogden, to be distributed, at *his option*, on behalf of the testatrix.



time, either in the presence or absence of Rolls; and he is as positively confirmed by Mr. Rolls, to this at least (the only feasible) extent—that no observation of the kind was ever made by Dr. Uwins, *in his presence*.

Upon the whole I am quite satisfied that the institution of this suit, in the *name* of the father, is a mere scheme, produced by an afterthought, of the *son*—his object being, to get possession, himself, of the deceased's property, and unincumbered with the trusteeship of Mr. Brogden. For the sake even of that father, the (nominal) *opponent*, I pronounce *for* the will: convinced, as I am, that he is far better off in the hands of his trustee, Mr. Brogden, than he would be in those of his son, Mr. Edward Brown. With respect to costs—the son is fixed with the costs of *opposing* this will, already: he admits, upon an interrogatory, that he has *undertaken* for these. The Court regrets that it has no power to condemn *him* in the costs to which the executor has been put, through his means, of *sustaining* it. The father, indeed, the (nominal) party in the cause, it might condemn in these: but a sentence to that effect would be futile in itself; nor, I am *sure*, does the executor wish it. It is upon this consideration *only* that, in pronouncing for the will, I give no costs.

1825.  
*Hilary*  
*Term.*

—  
BROGDEN  
v.  
BROWN.

1825.  
Hilary  
Term.



By-Day.

COOPER v. GREEN.

(On Motion.)

In all cases of "process" served on a *minor*, the Court requires a certificate of its having been served, in the presence of the natural, or legal, guardian of the minor; or at least in that of some person, or persons, upon whom the actual care and custody of the minor, for the time being, has *properly* devolved.

THIS was a cause of business of accepting or refusing letters of administration (with the will annexed) of Leah Jones, deceased; or, otherwise, of shewing cause why the same should not be committed and granted to John Cooper, a creditor of the deceased; promoted by the said John Cooper against Eliza Green, spinster, a *minor*, the residuary legatee, there being no executor named, in the said will. A decree to that effect had issued, with the usual intimation; had been *personally* served on the minor, and returned into Court; and letters of administration were now prayed, pursuant to the tenor of that decree.

The COURT,

Signified that, under the circumstances, it required further information, by affidavit, both as to the amount of the property, and also as to that, and the nature, of the debt: intimating, at the same time, that in all cases of *process* served on a *minor*, it required to be certified, of its being served in the presence of the natural, or legal, guardian of the minor; or, at least, in that of some person, or persons, upon whom the actual care and custody of the minor, for the time being, had *properly* devolved. The "certificate" in this case was of a "personal service" on the minor, *merely*.

Accordingly, it directed the motion to stand over, *generally*.

MARTINEAU *v.* REDE and others.1825.  
Hilary  
Term.  
*(On Motion.)*

**THIS** was an application for administration of the goods of William Oxberry, deceased, at the suit of a creditor of the deceased to the amount of 1,100*l.*, and upwards. The whole property of the deceased was *said* to be under 1,000*l.* in value: still, however, there was no statement on *affidavit*, as to the amount of property, exhibited. But

*Per Curiam*

This is not absolutely necessary where, as in this case, there has been a *personal* service of the usual citation, on the parties entitled to the administration in the first instance—*otherwise*, the Court always requires it.

Before granting letters of administration to a creditor, the Court always requires an affidavit as to the amount of the property to be administered; where there has been no *personal* service of the usual citation on the parties entitled to the administration in the first instance.

Motion granted.

By-Day.

GIBBENS and GIBBENS *v.* CROSS.

**THIS** was the case of a will presumptively revoked by marriage, and the birth of issue; in which the presumption was sought to be rebutted, by evidence tending to shew that the deceased meant it to operate.

A will is *presumptively* revoked by the testator marrying and having issue. That presumption, however, (the strength of

which varies according to circumstances) may be rebutted by evidence (strong in proportion) to shew that the testator *meant* it to operate, notwithstanding his marriage, and the birth of issue: but such evidence, to be effectual, must satisfy the Court as to this, *unequivocally*. A formal codicil, *subsequent*, referring in direct terms to that identical will, would, undoubtedly, as a republication of the will, be effectual to this.

## JUDGMENT.

1825.  
Hilary  
Term.  
GIBBENS'  
v.  
CROSS.

SIR JOHN NICHOLL.

The deceased in this cause, George Cross, made a will, bearing date the 14th of May, 1820, regularly executed and attested, by which he disposed of his whole property, real and personal, pretty equally, among his nephews and neices. It is by one of these nieces, Mary Cross Gibbens, and her husband James Gibbens, the surviving executors, that this will is now propounded. The deceased, at the time of making it, was a widower, without children; and the nephews and nieces, whom it purports to benefit, were his next of kin.

But, in the month of December, 1820, the deceased intermarried with Mary Cross, (the other party in the cause, contending for an intestacy in law,) his present widow: and they had issue of their marriage, a daughter born on the 14th of February, 1822; and a son born on the 13th of January, 1824. About five weeks after this, namely, on Saturday, the 21st of February, in that year, the deceased was suddenly struck with apoplexy, so as to deprive him totally of his faculties, as well mental as bodily: in which state he continued till the following Monday, when he died.

Now the will, such as I have described it, is clearly revoked, *prima facie*; for if a testator, after making his will, marries, and has issue, that will is *presumptively* revoked. Still, however, it is *only* presumptively revoked; and the legal presumption that it is, like any other legal presumption, is subject to be rebutted. The difficulty of rebutting it is greater, or less, according to circumstances. In the present case, for instance, it is enhanced by the circumstance of their being *two*

children, issue of the marriage, one of them a son; especially as the will disposes both of real, and personal, property. The presumption to be rebutted is the ordinary legal presumption, (for to have raised *that*, marriage, and the birth of a *single* child, would have sufficed,) somewhat fortified: and the evidence to rebut it must be strong in proportion. It must satisfy the Court, *unequivocally*, that the deceased meant and intended this will to *operate*, notwithstanding that *presumed* change of intention, consequent upon his altered circumstances; with reference to which, the law deems it to be *revoked, prima facie*. It rests with the parties setting up the will to produce such evidence to the Court. The *onus probandi* is clearly upon them: for they are the parties undertaking to rebut the legal presumption as to its being *revoked*.

Now they have attempted to effect this, in the first place, by pleading disaffection to the wife—and witnesses are produced to this, and to certain declarations, which are also pleaded, purporting, that the deceased meant to abide by his former will. But of serious, permanent, disaffection to the wife, there is no proof—the contrary, indeed, is pleaded on the part of the wife, and, I think, is fully proved. Again of declarations to abide by his former will, the principal, and spoken to by a witness eighty years of age after an interval of six months, turns out to have been words of mere heat and passion, produced by a transient quarrel with the wife; by no means inferring any thing like a deliberate intention, on the part of the deceased, to carry his threats into effect. On the contrary, there are declarations infinitely more likely to be sincere, and infinitely less likely to be mis-represented, utterly inconsistent with

1825.  
*Hilary*  
*Term.*

GIBBENS',  
v.  
CROSS.

1825.  
Hilary  
Term.  
GIBBENS'  
v.  
CROSS.

any intention on the part of the testator to adhere to the will, now propounded. These are spoken to by the medical man who attended the wife on the occasions of both her confinements; and by his *attorney*, to whom the deceased repeatedly expressed, in substance, an intention to make a new will; as, in the month of September, 1823, and in that of January, 1824. Looking then to the state of his *affections*, as it appears on the evidence, I see no reason for concluding it at all likely that the deceased *should* prefer his nephews and neices, to his wife and his children—and with respect to testamentary *declarations*, the evidence is such as to satisfy my mind, that they fortify, and confirm, instead of weakening, or impugning, the presumption said to be rebutted.

But this effect, again, is sought to be ascribed, to a *codicil*, made, *it is said*, a few days after the birth of his first child. This has been argued to amount to a *re-publication* of the will, so as to leave no doubt of the testator's intending it to operate. Now, had the deceased proceeded, on that day, to execute a formal codicil, referring in direct and express terms to this identical will, the Court, I admit, must have so considered it, and would have been bound to pronounce the presumption adverse to the will, effectually, rebutted. But I am inclined to think, for several reasons, that no such legal effect can be ascribed to it. In the first place, it is an extremely imperfect paper, unattested, and with blanks unsupplied the *body* of it; although the deceased, supposing it to have been written in February, 1822, survived the making of this codicil two whole years. But, secondly, and principally, its reference to the identical will now propounded

*inf*

is extremely equivocal. It begins, "This is a codicil "to my will dated the 18th of February, 1822." Now the reference here (18th February, 1822) *should seem to be* to a will of that date, and not to signify that the codicil was made on that day—especially as a date 1822, (generally) appears at the foot of the codicil. This, undoubtedly, is the grammatical construction of the phrase; for the substantive will, (not codicil) is that which last immediately precedes the date in question. True it is that no will of that date *appears*: but it is far from improbable that a will of that date, or something in the nature of a will, was actually made by the deceased. He had a daughter born on the 14th of February, in that year. It is very probable that he, soon after, made a will to provide for that daughter; and that the codicil in question, had reference to *that* will, and not to the will of 1820, now propounded. At all events, the reference of the codicil in question, to the will now propounded, is equivocal; and it is not, therefore, sufficient, in my judgment, to amount to a republication of that will, so as to rebut the presumption that he had *intentionally* abandoned it—fortified as it is, instead of being weakened, or detracted from, by what appears in the evidence as to the state of his affections, and even as to his testamentary declarations, in my view of their effect. The circumstance of this codicil being found in the same envelope with the will of 1820, by no means, unequivocally proves that it was deposited there, in order to its being considered a part of that will. It has various bends, and folds, and so has the envelope; which renders it probable that it was not deposited there, in contact with that will, immediately, and in the first instance.

1825.  
Hilary  
Term.  
GIBBENS'  
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1825.  
Hilary  
Term.  
GIBBENS'  
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CROSS.

Lastly, there is a third testamentary paper before the Court, every way imperfect, indeed, and without date, or signature, but not unimportant in the cause. As to the particular time when this was written, all which appears is, that it was subsequent to the birth of the daughter, but preceded that of the son. It is not impossible that *this* was the "*will*" (so styled) meant to be referred to by the codicil, supposed to have republished the will of 1820. But, be that as it may, this third paper, though inoperative, *per se*, under the circumstances, notwithstanding the sudden death of the testator, is strong to repel the notion of any intentional adherence on his part to the will of 1820. For its object is to postpone the nephews and nieces to the wife and children; giving the bulk of the property to the wife, and her issue, in the first instance.

Upon the whole, if the legal presumption were the other way—did the law presume the will of 1820, to be adhered to, instead of presuming it, as it does, to be abandoned—I am of opinion that this third paper, coupled with the evidence as to the state of his affections, and as to his intention of making a new will altogether, would be almost sufficient to repel *that* presumption, and to compel the Court to pronounce for an intestacy. But the actual, legal, presumption being as it is; *and* being, as it is, fortified and confirmed, by the evidence, in every part, as well as by this third paper, I pronounce the will of 1820 to be revoked; and that this deceased is dead, so far as appears, intestate in law.

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1825.  
Easter  
Term.

## EASTER TERM.

4th Session.

IN THE PREROGATIVE COURT OF CANTERBURY.

In the goods of DON FRANCISCO RIOBOO, deceased.

4th Session.

(*On Motion.*)

**DON FRANCISCO RIOBOO**, late of Lima, died several years ago, in Lima, having made his will, bearing date the 15th of June, 1819, of which he appointed certain executors, who appeared to have taken various steps relative to the effects of the testator in the Courts at Lima.

The testator had remitted 40,000 dollars to two mercantile houses in London, at interest; each having received 20,000 dollars; in whose hands such sums, with interest, were still remaining.

An official extract consisting of the inception of this will—a clause therein (the 34th) being that bequeathing these 40,000 dollars—the appointment of executors—and the concluding part of the will, had been transmitted to this country; together with a power of attorney from the executors, and a substitution under it to Samuel Winter, Esq., of London, authorising him to recover from Messrs. Darthez, brothers, merchants in London, such sum or sums of money as might be in

Administration, under certain limitations, of the goods of a foreigner decreed to the substituted attorney of his executors, with an official copy annexed of "*extracts*" (only) "*from his will*"—such extracts consisting of the beginning and ending of the will; and of two clauses therein; the one containing the appointment of executors; and the other a bequest of the testator's (only) property in this country.

1825.  
Easter  
Term.

their hands, belonging to the estate of the testator ; and to take all needful measures for the recovery thereof, before all competent tribunals—Messrs. Darthez being one of the two houses, to each of which 20,000 dollars, as already said, had been remitted by the testator in his life time. No other property belonging to the said testator than the said 40,000 dollars, with interest, was in this country.

The extract, as above, from the said will, together with authenticated copies of the probate of the same granted by, and of several petitions and decrees relative thereto had before, the legal Spanish authorities at Lima were now exhibited: as also were the power of attorney and substitution to Mr. Winter, in the Spanish language, with notarial translations, and affidavits in verification of the several facts stated in the case. Whereupon

The COURT,

Was pleased, on motion of counsel, to decree administration, *with the said extract from the said will annexed*, limited to the effects of the deceased in the hands of Messrs. Darthez, merchants, in London, (and also further limited until the will itself, or a more authentic copy of the *extract*, should be brought into the registry) to Mr. Winter, as substituted attorney of the executors named in the same.

1825.  
Easter  
Term.

CONSISTORY COURT OF LONDON.

1st Session.

WILLIAMS v. GOODYER.

**THIS** was a cause of office, promoted by the Rev. Theodore Williams, vicar of Hendon, in the county of Middlesex, and diocese of London, against James Goodyer, a parishioner, for “ quarrelling, chiding, and “ brawling, by words, at a vestry meeting, in the “ vestry room belonging to, and *situate in the church-yard* “ *of*, the said parish of Hendon”—and also, for “ using “ scurrilous and insulting language to the Rev. The- “ odore Williams, clerk, the vicar of the said parish, “ while presiding as chairman of the said vestry.

The articles, after pleading the statute of Edward VI, against quarrelling, chiding, and brawling, by words, in any church or *church-yard*—and also, *that*, by the laws, canons, and constitutions *ecclesiastical*, of this realm, all persons are bound to demean themselves orderly, soberly, and peaceably, in chapels, churches, and *church-yards*, upon pain of *ecclesiastical* censure—proceeded to charge Mr. Goodyer, *specifically*, with the offence (or offences) in question—expressly pleaded to have been committed at “ a monthly vestry meeting, “ held on the 29th of October, 1823, in the vestry “ room belonging to, and *situate in the church-yard* “ *of*, the parish of Hendon, for the purposes of auditing “ the overseers’ accounts, and other parish business;” at which Mr. Williams, as vicar of the parish, was in the chair.

*Quare*, whether one who chides and brawls in a vestry room partly in, and partly out, of a church-yard, incurs thereby the penalties of 5 and 6 Edward VI. c. 4, s. 1. And *quare*, whether the gross abuse of a minister, while presiding at a meeting of his parishioners in vestry, be not an ecclesiastical offence, and punishable, *as such*, by the general ecclesiastical law: although it be not liable to be dealt with as a “ chiding and brawling” within the statute of 5 and 6 Edward VI. by reason, that the vestry was *clearly*, not held in a consecrated place, i. e. within a church or church-yard.

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WILLIAMS  
v.  
GOODYER.

In answer to this, it was pleaded, on the part of the defendant, that the articles were false; at least in that part of them which alleged *that* the said vestry meeting was held in a room *situate in the church-yard of the said parish of Hendon*—for that, in truth and fact, “the articulate vestry meeting was held in a certain “room, called the parlour, situate on the ground floor “of an inn, alehouse, or public house, known by the “name or sign of the Greyhound,—*that* the said house “is licensed as a public house—*that* the said room or “parlour is constantly used by persons resorting to the “said public house for entertainment, or refreshment— “*that* parish dinners for the said parish are, usually, “had in the said room or parlour—*that* public ordi- “naries, or dinners, on Sundays, and on other days, “are frequently held in the same—*that* balls, and “dances, are occasionally given therein—and that *no* “part of the said room, or parlour, or of the public “house of which the same is a part, is *situated in the “church-yard* of the said parish of Hendon.” The allegation also went into circumstances to shew that the true *character* of the transaction articulate was not that ascribed to it in the articles; and that the offensive expressions imputed to Mr. Goodyer, in answer to an observation of Mr. Williams, the vicar, *were* not meant to apply to that gentleman, *personally*; but to some anonymous informant, upon whose authority the remark that provoked them was, avowedly, made.

A second plea on the part of Mr. Williams was now tendered, in reply to that of the defendant, pleading in substance.

*That* “the inn known by the name or sign of the “Greyhound, situate in the parish of Hendon, was

“formerly ‘the church house,’ and adjoins to, and the  
 “back of the same abuts on, the church-yard of the  
 “said parish—*that*, at various times, subsequent to the  
 “year 1754, divers alterations and repairs have been  
 “made in the said inn; and, at some such times, con-  
 “siderable encroachments have been made on the said  
 “church-yard, parts of which have been taken into the  
 “said inn—particularly, *that* the room in the said inn,  
 “called the parlour, was enlarged, or built out, upon  
 “the church-yard of the said parish—and *that*, at the  
 “present time, the said parlour does encroach upon the  
 “said church-yard, to the extent of thirty superficial  
 “feet, or thereabouts.” In part supply of proof, a  
 plan of the church-yard of Hendon, taken by an expe-  
 rienced surveyor, in the year 1754, at the expence of  
 the then lord of the manor of Hendon, was annexed to  
 the allegation—as also, was a second plan of the same,  
 taken also, as pleaded, by an experienced surveyor, in  
 the present year, 1825—and it was expressly pleaded,  
 that, on a careful comparison of the two, the encroach-  
 ment of the parlour of the Grey-hound inn, upon the  
 parish church-yard of Hendon, to the extent of thirty,  
 at least, superficial feet, as before pleaded, subsequent  
 to the year 1754, was distinctly apparent.

*The admission of this allegation* WAS OPPOSED on the  
 part of the defendant. It was *said*, it furnishes no  
 answer to the case laid by the defendant. It admits  
 that the meeting was held at a public house; in a room  
 or parlour, constantly used by persons frequenting the  
 said public house, in manner as, and for the purposes  
 stated by, the defendant in his allegation; in doing  
 which it admits the defendant’s whole case. Granting  
 the fact to be, as pleaded, that a part of this room or

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parlour (a comparatively *small* part) is locally situate within the true boundary of the church-yard, it would fail to sustain, this, the original case as charged in the articles: nor would the defendant, clearly, be subject (it was said), to the penalties of brawling by words *in a church-yard*, for any words whatsoever, uttered in *such* a place, howsoever proved. It was also argued that no evidence upon the plea was *likely* to satisfy the Court as to the truth of the main fact pleaded: though it was admitted that the fact must be taken as *true* for the purpose of the argument: its *relevancy* being the sole point, strictly, cognizable by the Court in this stage of the cause.

IN SUPPORT *of the allegation*, it was urged, on the other hand, that the fact now pleaded of *a part* of this room or parlour being *within* the church-yard, coupled with those other, admitted, facts, of the house itself being church property, and this particular room or parlour being, immemorially, used as the parish vestry room, was sufficient to sustain the description of it contained in the articles; and to subject the defendant, if proved to have uttered *there* the words imputed to him, to the penalties of having chode or brawled, in a consecrated place. It was also *said*, that to disturb an incumbent, while presiding at a meeting of his parishioners in vestry, in the manner charged in the articles, was an ecclesiastical offence by the *general* ecclesiastical law; although the vestry were not held in a consecrated place, or, within a church, or church-yard. But this last part of the argument, it should seem, rather went to the defendant's conduct, viewed in *another* light, and to the general merits of the case, than was applicable to the question immediately before

the Court, the admissibility of this particular allegation.

**The Court**

Said, it should admit the allegation, if this were insisted upon, not deeming it so *clearly* irrelevant, as, if proved, to be of no *possible* weight, and efficacy, at the final hearing of the cause. At the same time, it earnestly recommended that the case should be adjusted, *out of Court*, for the sake of both parties—looking to the difficulties which must attend its progress, and the uncertainty of what the result would be (*a*).

(*a*) The parties to the suit, profiting by this advice of the Court, came to an amicable arrangement—and the suit itself was afterwards, on the same court day, dismissed by mutual consent. No costs were given on either side.

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## TRINITY TERM.

2nd Session.

IN THE ARCHES COURT OF CANTERBURY.

ATKINSON *v.* ATKINSON.

(By Letters of Request from the Diocese of Winchester.)

2nd Session.

(*On Motion.*)

A witness, upon cross examination, iscompellable, if required by the ministrant, to produce all written communications, addressed to him, the witness, by the solicitor, or other agent, of the producent, relative to his examination as a witness in the cause.

**THIS** was a cause of divorce or separation *a mensâ et thoro* by means of cruelty, (a) and adultery, promoted by Elizabeth Atkinson, of Alverstoke, in the county of Southampton, and diocese of Winchester, against her husband, Thomas Atkinson.

The following interrogatory had been addressed to William Price, surgeon, a witness on the libel.

Let the witness, William Price, be asked—"are you not well acquainted with Mr. Weddell? (b) Did not the said Mr. Weddell call upon you to become a witness in this cause? Has he at any time, and when, made suggestions, or remarks, to you, concerning the

(a) The Court, on the admission of the libel, had directed the articles charging cruelty to be struck out.

(b) Mr. Weddell was the producent's solicitor. It appeared in the cause that he had formerly been the solicitor of Mr. Atkinson; and was now employed by his wife *against* him. Mr. Weddell himself, also, was a witness examined on the libel.



ministrant, adapted to prejudice the ministrant in your esteem? Has he not told you that a tremendous, and *most* disgraceful, case would be established against the ministrant? On your oath, has not Mr. Weddell, either by *letters* (*if by letters, let the witness be desired, if they are in his possession, to leave them with the examiner to be annexed to his deposition,*) or verbally, requested you to state, that you, at one time, attended the ministrant when afflicted with the venereal disease, or, that you might safely depose to that effect? Let the witness be desired to set forth *all* that passed between him and the said Mr. Weddell, on the subject interrogate."

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In answer to this interrogatory, the witness had deposed, in substance,

"*That* he, the respondent, was well acquainted with Mr. Weddell—*that* Mr. Weddell did call upon him to be a witness in this cause—*that* he had expressed to the respondent, and stated reasons for it, a very unfavourable opinion of the ministrant; and that such opinions and reasons were, certainly, calculated to prejudice the ministrant, in the mind of the respondent, whatever opinion he might have *previously* entertained of him; but that such, Mr. Weddell's communications, were private, and confidential—*that* Mr. Weddell has expressed himself to the respondent as sanguine that the charges against the ministrant would be proved; but he, the respondent, forgets in what particular terms—*that* Mr. Weddell applied to the respondent, both verbally, and *by letter*, respecting his becoming a witness: on such verbal application, he asked the respondent whether he, the respondent, had not attended the ministrant for a venereal complaint; but without, *otherwise*, requesting the res-

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 ~~~~~  
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pondent to state such to be the fact, or observing that he might safely so depose (a)—the respondent has four or five letters which he received from Mr. Weddell on the subject interrogate, but, he *refuses to deliver them to the examiner, as desired by the interrogatory*, or to state the contents of them, unless compelled so to do by the mandate of the Court—his reason for such a refusal is not a wish to benefit either party in the cause—it merely proceeds from his considering that a delivery up of the said letters, unless by the directions of an authority that he is bound to obey, would be, on his part, an unjustifiable breach and violation of private confidence.”

The Court was now *moved* by counsel, to decree a monition against the witness, Price—calling upon him to bring into, and leave in, the registry of the Court, the letters so referred to by him in his deposition—such letters being communications from the solicitor of Mrs. Atkinson, and addressed to the witness upon the subject of his examination.

COURT.

I think that the witness is bound to produce the letters. If, upon cross examination, a witness is bound to state *verbal* communications between himself and the producent's solicitor relative to his examination ; it seems to me that he is compellable, *a fortiori*, to produce *written* ones. Verbal communications may

(a) The witness's deposition to this part of the case, in effect was—that the complaint for which he had attended the ministrant was a *gonorrhea*—that such a complaint *may* originate from *other* causes, though it actually does originate in the one suggested in the libel, in nine cases out of ten—lastly, *that* he, the witness, had made no inquiries, at the time, as to the manner in which it actually did originate, in the instance in question.

have been misinterpreted by the witness, or may be mis-stated, through the witness's imperfect recollection of them, to the necessary prejudice of *one* of the litigant parties. Written communications speak for themselves; being independent of the witness's *memory*—and upon the tenor of such, in point of propriety or impropriety, the Court is able to put its own interpretation. The letters in question, I observe, are not suggested to be relative to confidential matters of any *other* sort: the witness expressly restricts them, in his deposition, to the subject interrogate, namely, that of his examination, as a witness, in the cause. Unless the letters are procurable from the witness by other means, let the monition issue, as prayed.

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BRUCE *against* BURKE.

3d Session.

(By Letters of Request from the Official Principal of A marriage in Ireland, in a private house, at any hour of the day or night, is valid, if celebrated by a person in holy orders, between two papists, according to some catholic ritual. A marriage so celebrated between two parties in a private house in Ireland alleged to be null by reason (a sure ground of nullity) that one of the said two parties was a protestant. That alleged ground of nullity held not to be sustained: and, consequently, a second marriage, *de facto*, of that one of the said two parties, in the life time of the other, pronounced null and void.

**THIS** was a cause of nullity of marriage, on account of a former subsisting marriage, promoted on behalf of Mary Anne Bruce, against Tobias Burke. The defence set up was the alleged nullity of the former (an Irish) marriage; under the circumstances stated in the judgment.

It is competent to a party to set up the nullity of a first marriage, in bar of a sentence prayed of the nullity of a second by reason of that first: though he is *convict*, already, of bigamy in respect of the said two marriages.

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## JUDGMENT.

Sir JOHN NICHOLL.

This is a suit of nullity of marriage promoted and brought by Mary Anne Bruce against Tobias Burke—the alleged ground of such nullity being, that he, the defendant, had a wife living at the time of his marriage, *de facto*, with the plaintiff, or complainant. Most of the facts are indisputably proved. I mean the following. The double marriage of *a* Tobias Burke, first with Mary Butler, in June, 1815, and, secondly, with Mary Anne Bruce, the complainant, in December, 1820, living the said Mary Butler, is indisputably proved. It is also indisputably proved that *a* Tobias Burke was indicted at the Old Bailey, in 1822, for having so, *feloniously*, in the life time of a first wife, intermarried with Mary Anne Bruce, the present complainant—that he was convicted of the felony in the said indictment specified, and sentenced to transportation for seven years—and that, at the time of the issue of the citation in this cause, he was, and, I may add, still is, a convict on board the *Leviathan*, a convict hulk, lying in Portsmouth harbour. The identity of this Tobias Burke, with Tobias Burke the party proceeded against in this suit, and of the second marriage in respect of which he was so convicted of bigamy, with that of which a sentence of nullity is now prayed, is also, I think, amply established. In addition to the substantive proofs of such double identity, I observe, that the defence set up plainly admits it. For the defence set up is, not a diversity in either; but that at the time of the first marriage, the defendant, admitting *his* identity, and that of his second marriage with the marriage now sought to be annulled, was a *protes-*

*tant*—his said first marriage being pleaded, and proved, to have been celebrated in a private house, at Cashel, in Ireland, by a popish priest, and *to be* a valid marriage, both parties being papists, on the one hand (a)—and it being expressly pleaded, and proved, to be *essential* to the validity of a marriage so celebrated, on the other hand, that at the time of its actual celebration both the contracting parties *should be* papists (b).

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(a) The libel pleaded that “ by the law prevailing and established in Ireland in the year of our Lord 1815, and long before, in that part of the united kingdom of Great Britain and Ireland, called Ireland, a marriage had and celebrated by a Roman catholic priest, in a private house, according to the rites and ceremonies of the Roman catholic church, between two persons, both of the Roman catholic religion, was and is valid to all intents and purposes whatever in law.” This article of the libel was deposed to in terms of positive affirmance by two gentlemen, barristers, each of whom had practised at the Irish bar. According to their evidence “ there is no restriction of time or place as to catholic marriages in Ireland—a private house is as good as a church, and the afternoon or evening as any canonical hour.” The marriage, however, must be “ by a Roman catholic priest, or a person in orders (for a protestant minister will do as well) and according to the form of the Roman catholic ritual,” as it is expressed by one of those gentlemen. The other expresses it. “ It may be celebrated by a Roman catholic priest, or a priest of any other denomination. But it must be by the Roman catholic form, or at least some form that unites the parties in the state of matrimony.” The form of marriage, as celebrated according to the ritual used in the Roman catholic church, was stated at length by a witness examined on the libel, Mr. Henry, a catholic priest, in answer to a special interrogatory addressed to him as to that particular.

(b) The defensive allegation pleaded art. 1.—“ that in and by an act of parliament, passed in the kingdom of Ireland, in the nineteenth year of his late majesty king Geo. II. c. 13, entitled “ an act for annulling all marriages to be celebrated by any Romish priest between protestant and

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The first marriage, then, as I have just said, was celebrated at Cashel, in June, 1815—and it is proved, and indeed admitted on all hands to have been a valid marriage, if both parties were papists. It is in the negation of this last particular, as to one of the parties, that the defence set up solely consists. Accordingly, the substance of the defensive plea is, *that* Burke, the defendant, was born at Templederry, in the county of Tipperary, in the year 1794; and was baptized, in that year, by the then vicar of the parish, a priest, or minister, in holy orders, of the church of Ireland—*that*, in 1801, he was sent, for education, to a protestant school in Templederry—*that* from 1807 to 1811, he was resident with a wine and spirit merchant, to whom he had been apprenticed, in the first of those years, at Carlow—and *that*, in 1811, he went to Dublin, and there continued up to the period of his *pretended* marriage (so styled in the allegation) with Mary Butler,

“protestant, or between protestant and papist, and to amend, and make  
“more effectual, an act passed in this kingdom, in the sixth year of her  
“late majesty queen Anne, entitled, an act for the more effectual prevent-  
“ing the carrying away, and marrying, children, against the wills of their  
“parents, and guardians; it is, amongst other things, enacted in the  
“words, or to the effect following, to wit—*that* every marriage that  
“shall be celebrated after the first day of May, which shall be in the year  
“of our Lord God, 1746, between a papist and any person who hath  
“been, and professed himself to be, a protestant, at any time before such  
“celebration of marriage; or between two protestants; if celebrated by a  
“popish priest, shall be, and is hereby declared, absolutely null and void  
“to all intents and purposes, without any process, judgment, or sentence  
“of law, whatsoever.” No exhibit was annexed to, or witness examined  
upon, this article—the act in question being, expressly so pleaded, a  
public act, and as such to be known and taken notice of by all judges  
and courts of judicature.

in June, 1815. And the allegation *expressly* pleads, *that*, during the whole of the above period, (but more particularly for the last twelve months anterior to the said *pretended* marriage) he, Burke, was, and professed himself to be, a protestant of the church of Ireland—attended divine service in churches of the protestant communion—and conformed to the rules and ordinances of the protestant establishment.

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It thus appears, by his own plea, that Burke was a native of Tipperary, not far from Cashel; and that he had been resident in Dublin for some years prior to June, 1815. And it appears, by the evidence of a witness, named Willis, that he had occupied, and carried on business as a spirit dealer, in a house situate in North King street, Dublin, from the month of March, 1814, to that of September, 1815, including the twelve months immediately preceding his marriage; during which, it is pleaded in particular, that he, Burke, was, and professed himself to be, a protestant. Willis is confident as to dates; having purchased of Burke the remainder of his term in the house in North King street, on his quitting it, in September, 1815.

Being so resident in North King street, it appears, that Burke became acquainted with his then future wife, Mary Butler, on occasions of her accompanying her father from Cashel, where he resided, to Dublin. Butler, the father, who was a leather merchant, often went from Cashel to Dublin, on business; and sometimes, at least, lodged with Burke, in North King street, during his stay in Dublin. After a short courtship, Burke proceeds to Cashel, the residence of the wife's father, in order to be married *there*, at Cashel; taking with him a certificate from his parish priest, in

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Dublin, as to the fact of his being a catholic—this, it seems, being always required of a non-parishioner, before a Roman catholic priest will venture to celebrate the marriage of a non-parishioner *as* a Roman catholic, and according to catholic rites. The witness, Ryan, (a sister of Mary Butler) positively deposes to having seen, and read, such certificate, the evening before the marriage; as also to its actual production by Burke to the officiating priest, at the time of the wedding. Indeed, the penalty to which every catholic priest is liable for celebrating a marriage between a catholic, and a protestant (*a*), creates a strong presumption that such, the *usual*, precaution was taken in the instance in question, independent of the positive proof of that fact furnished by Ryan's testimony. And, I must also presume, that the priest who granted the certificate was satisfied as to Burke being a papist—a matter, this, with respect to which he could not well be *mistaken*; as Burke had been, for the preceding twelve months, residing in one and the same house in his parish, that in North King street.

At Cashel then, in the house of the wife's father, Burke and the first wife, Mary Butler, were married according to the rites and ceremonies of the Roman catholic church, by Dr. Wright, the then parish priest of Cashel, but who is since dead: the marriage is deposed to by two witnesses actually then, and there, present; and it clearly was a valid marriage, both parties being *papists*.

As to the *wife*, this admits of no question—and it should seem to admit of as little with respect to the

(*a*) Namely, transportation; and a pecuniary forfeiture—that of £500.



*husband*, even upon the facts in evidence already stated. Added to which, every circumstance of the case is strongly corroborative of the fact of Burke being of the catholic persuasion. His whole family, with the exception of an elder brother, are proved to have been papists—a brother, Edmund Burke, a papist, was present at the marriage. The wife's family were all papists: nor of course would they have consented to the marriage at all, or at least not to its celebration in that form, had they entertained any suspicion that Burke was a protestant. But the *father*, in the course of his visits to Dublin already stated, *must* have *known* the fact to be so: if, as pleaded, he, Burke, at all times, professed himself to be a protestant; and attended divine service in the churches, and conformed to the rites and ordinances, of the protestant establishment.

But the fact so constructively, *prima facie*, proved, is not left to rest either on the proofs already stated, or upon mere inference from the circumstances to which I have just adverted. Several witnesses have been examined on the libel, who not merely depose to *their* belief, and to the *general* reputation, of Burke being a papist; but who speak to other facts, utterly inconsistent with the case now set up of his being, in truth, a protestant. They depose to his attending mass—not indeed very frequently, but still, to his attending mass—both at Carlow and Dublin, up to the period of his marriage in 1815. The witness, Kehoe, who had been his fellow apprentice at Carlow, and renewed his acquaintance with him at Dublin, speaks to this; and to his demeaning himself, in all respects, *as a worshipper*, at mass, sprinkling himself with holy water on entering

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the place where it was celebrated, and so on. The witness, Mr. Henry, a Roman catholic priest, deposes to the following fact. He says, *that* Burke had, at one time, lodging in his house in North King street, a Roman catholic clergyman, named M'Quirk; who being very ill, he the deponent, as the Roman catholic curate of the parish, was requested by Burke to go and read prayers to Mr. M'Quirk, in the ordinary way of chapel service—Burke adding, that if the deponent would attend, he would, himself, assist in the responsive part of the service, and get the two lights, and wine, and other things, ready; which, he said, he knew how to do very well, as he himself was of the same persuasion. The witness goes on to say, that he attended accordingly, but declined performing the service, as he found Mr. M'Quirk in too flighty a state of mind to attend to it. Burke, however, he adds, was very urgent with him to *proceed*, notwithstanding; as considering the prayers in the service for the sick effectual to drive away fairies, and evil spirits; “a notion,” says the witness, “which none but very “weak and superstitious catholics entertain.” Accordingly, “it being a maxim with him,” he says, “to “discourage such notions,” he refused to perform the service. From this, as well as from other circumstances, and from the result of his enquiries at the time of Burke's first coming into the parish as to his religious persuasion, this witness concludes, by expressing his firm conviction, and belief, *that* “what religion he, “Burke, had, during his residence in North King “street, in 1814 and 1815, was, without any manner “of doubt, that of the Roman catholic church.”

After this marriage with Mary Butler, in 1815,

Burke, accompanied by his wife, went to Dublin; where, and at Clonmell, and other places in Ireland, they continued to live and cohabit together as husband and wife, till about the year 1817; he, Burke, still being all this time, or professing himself, a catholic. This is proved by a variety of circumstances. For instance, they had two children, daughters, Honora and Johanna; each of whom was baptised by a catholic priest, after the catholic form; on one, at least, of such occasions, Burke being actually present. In 1817 or 1818, Burke having, as some of the witnesses express it, become "unfortunate in business," left Ireland, and came to this country, accompanied by his wife and children, or one of them, Johanna. Of his history in this country prior to his courtship of Miss Bruce, all that appears in the evidence is, that in 1819, he procured the admission of Mary Butler (or Burke) and a sick child, the daughter, Johanna, into Pancras workhouse; where the mother and child remained from the 22nd of September in that year, till the 25th, when the child died; immediately upon which the mother quitted the workhouse. Of the mother (the first wife) nothing more appears in the evidence, than that she was living at the time of the second marriage. The witness, Lee, proves that she was actually present in Court, at the Old Bailey, during the defendant's trial for bigamy, in 1822—where, as already said, he was convicted, and sentenced to transportation for seven years. So far, then, the marriage with Butler should clearly seem to have been a *valid* marriage.

In the year 1820, however, notwithstanding the premises, Burke, the defendant, pays his addresses in the way of marriage, to Miss Bruce, the complainant;

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representing himself as a bachelor: and, after a correspondence of some length, clandestine in every part of it, and in defiance of the express prohibition of the lady's father, on its coming to *his* knowledge, a marriage *de facto*, by licence, of the parties, is had at Islington church, on the 4th of December, 1820. In the spring of 1822, Mr. Bruce, the father, having learnt that Burke was a married man at that time, procured, in the first instance, his trial and conviction for bigamy; and, subsequently, the institution of the present suit; in order to obtain a sentence declaratory of the nullity of the marriage *de facto*, so had, in December, 1820, between the defendant, and his (Bruce's) daughter, the complainant in this cause.

In the history of the trial for bigamy, I observe, that the bill was found by the grand jury, in May, 1822, but that the trial itself was not had till the following July. Burke, therefore, had full time, as he had every inducement, to set up, at *that* time, the invalidity of the first marriage, by the case now sought to be made in this Court; on proof of which, to a jury, he would, most unquestionably, have been acquitted. Notwithstanding however, he is *convicted*; either not having set up, or having failed to sustain, the case *now* sought to be made, on the occasion of his trial for bigamy. It was still, however, open to him, in spite of that conviction, to plead and prove in this Court the invalidity of the first marriage, in bar of the sentence now prayed. In order to this he has, *here*, at least, *regularly* put in issue the fact of his having been a protestant at the time of his first marriage in June, 1815; and, by proving it, he will clearly entitle himself to a sentence of dismissal. The matter so pleaded, if it be, is surely

not even *difficult* of proof. For instance, confining it to the last, and most material period of time, the twelve months immediately preceding the marriage—Burke, during all that time, was stationary in North King street. If a protestant, during all that time, frequenting divine service in the churches, and conforming himself to the ordinances, of the protestant establishment, could that, in such a place as Dublin, have escaped the knowledge of his neighbours, friends, and acquaintance? It *must* have been matter of pretty general notoriety; and easy of proof, in the same proportion. At the same time, the burthen of proof as to this particular fact clearly rests upon him, on every consideration. The fact of his having been a protestant, against his own professions, at least, on the occasion of his first marriage—contrary to all probabilities, and to the understanding, at that time, of all parties, and privies, to the marriage; and contrary to much, at least, of his own conduct, as well prior, as subsequent, to the marriage—he must prove, and by evidence most satisfactory, to bar the sentence prayed by the present complainant. And this, the rather, as the conduct of this person to one of these two females, (the only question being to *which* of the two) is infamous, upon his own shewing. Either to Butler, as inveigling her into a sham marriage by passing himself off to her, and her family, as a papist, whilst in truth he was a protestant; or to Bruce, as practising on her the equally or still more infamous artifice, (to accomplish the same object) of representing himself to her, and her family, and connexions, as a bachelor, free from matrimonial engagements, whilst, in truth, he was under such engagements, and a married man.

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Of the evidence actually adduced by Burke of his being a protestant at the time of his first marriage, it may be sufficient to say, that it fails to sustain that alleged fact, in every particular. Three witnesses have been examined on the defensive allegation. The two first of these, indeed, depose pretty confidently, in general terms, to the fact, that Burke, at all times, according to their impression and belief, was a protestant—but their grounds of inference, their assigned reasons for that impression and belief, are, most of them, extremely vague, and unsatisfactory: nor do the witnesses, as to the *few* of a contrary description, depose in terms to which the Court can attach much, or any, credit, contrasting them with the much more probable evidence to a contrary effect, given by the much more credible witnesses on the libel. Dwyer, for instance, the first of the two, who represents himself as a native of the same district in Ireland, and connected by marriage, with the defendant, after saying that he *knows* nothing of his birth, baptism, or education, (of which by the way being *as* pleaded, there is nothing in the shape of proof,) but merely that he “*always understood that he was bred up a protestant,*” goes on to depose, that he lived with the defendant, in North King street, for nine or ten weeks, as a sort of assistant in his business, (till he could procure some better situation, which he was on the look-out for, as a clerk or accountant,) in the winter of 1814. During that period, he says, “Burke, the defendant, by his conversation and habits, always led him, the deponent, to suppose, that he was a protestant. Deponent could not think otherwise of him. He used, regularly, every Sunday, at least once a day, to go to church, the regular English

“church in Dublin, either to Christ church, or St. Patrick’s church: never to chapel or mass. Besides this, he used often to be talking to deponent about his principles, deponent being a catholic. He used to give him books to read on controversy, and try to persuade him to turn protestant, and to read the New Testament; and, several times, he prevailed on the deponent to accompany him to church.” Does all this appear *crédible* in contrast with what is deposed to of this same Burke, at the same period, by the witnesses on the libel? The witness, Dwyer, I should say, is a journeyman painter, in this metropolis—as his fellow witness, Egan, whose evidence is of the same *general* complexion, is a common day labourer. Mr. Armstrong indeed, the third, is a fully credible, witness; but his evidence amounts to little or nothing. He, like the others, speaks to his belief that Burke was a protestant; but it seems to be a belief taken up upon slight grounds—the principal being, his having *once* seen him at Christ church, in Dublin. He says, too, that Burke, being a posthumous child, the chief charge of him, *of course*, fell upon his eldest brother, Thomas, a protestant, and, subsequently, a clergyman of the established church; from which circumstance he *infers*, that Burke was *educated* in protestant principles. But that he really was so; or that he ever professed himself a protestant; or evinced his adherence to protestant principles by any act of outward conformity, as by constant attendance at churches of the protestant establishment, as pleaded, or any thing of that sort, he, the witness, disclaims, in terms, any knowledge whatever.

Upon the whole evidence, of which the above is a

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summary, I have no hesitation in saying, that the defence set up is not made out in proof—but that the defendant's first marriage was a valid and subsisting marriage, at the time of his marriage, *de facto*, with the present complainant; and, consequently, that she is entitled to a sentence declaring, and pronouncing, that marriage null and void.

4th Session.

ATKINSON v. ATKINSON.

(On the Admission of an exceptive Allegation.)

An allegation exceptive to the testimony of a witness, to be admissible, must plead matter not pleadable before publication: and it must be such as, if proved, will materially discredit the witness. It must be pleaded, too, with all possible specification as to times, places, persons, and so on.

Where a witness is *designed* (a *fortiori* vouched) by the one

party, to precise facts, it is open to the other to plead, before publication, declarations of the witness contrary to those facts: which if he does not, he shall not plead them, after publication, in exception to the testimony of the witness: unless they are *noviter perventa*, &c. i. e. come to his knowledge since publication.

**THIS** was a cause of divorce, or separation *à mensa et thoro*, by reason of cruelty and adultery, promoted by the wife against the husband, as stated in the case next but one preceding. The present question arose upon the admission of an allegation, exceptive to the testimony of a witness examined upon the libel.

JUDGMENT.

Sir JOHN NICHOLL.

The principles, applicable to pleas of this description, are sufficiently familiar, to admit of their being referred to, without the formality of any previous detail of them. As with reference, then, to those principles, it appears to me that the present allegation is, altogether, inadmissible.

The witness whose testimony is excepted to, is a



young woman, named, Harriet Hobbs. She, it seems, has deposed, on the 15th and 16th articles of the libel, as follows—On the 15th, *that* “from what she, the “witness, saw on those occasions” (thereby meaning the occasions specially referred to by her in her deposition on the said article) “she has no doubt but that “Mr. Atkinson (the defendant) and Ann Rolls” (a party with whom the said defendant is charged to have committed adultery in the libel) “upon many *other* occasions of their being alone together in the house of the “latter, as deposed, had the carnal use and knowledge “of each other’s bodies,” &c.—And on the 16th, *that* “she, the deponent, has no doubt, but verily believes, “*that* Mr. Atkinson, and Mrs. Rolls, upon the occasion “just deposed of” (thereby meaning upon an occasion specially referred to in her examination upon the said article) “had also the carnal use and knowledge of each “other’s bodies,” as above. The *alleged contradiction* is, *that* “she the said Harriet Hobbs, hath, in the “presence of *divers* credible witnesses, both shortly “before, and shortly after, her said examination in this “cause, admitted, and confessed, that she verily believed that they, the said Thomas Atkinson, and Ann “Rolls, never had the carnal use, and knowledge, of “each other’s bodies” and, that she hath also, since her examination, in conversation with *some* of her friends and acquaintance, stated, that “she verily believed “no such adulterous intercourse had taken place—that “it could not, as she verily believed, have taken place, “without her knowing of, or seeing it; and that she “never had seen, or known of, any thing improper, “passing between the said parties.”

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Such, in substance, is the first article of this allegation—it is, in a word, that the witness having deposed on the 15th and 16th articles of the libel, to her *belief* that adultery *was* committed between the parties articulate; has made verbal declarations, *out* of Court, to her *belief* that it *was not*.

Now it seems to me, that to the admission of this article of the allegation, there is an objection almost fatal in itself, *in limine*,—it pleads matter which might, and which therefore should, have been pleaded, *before publication*. The 15th and 16th articles of the libel, each conclude with averring that adultery was committed between the parties articulate, on certain occasions therein, severally, specified. And the witness designed, and almost vouched, to those articles was Harriet Hobbs. Now if Hobbs, at any time before publication, had asserted her disbelief that adultery was committed between the parties on the occasions articulate, might not this have been pleaded *before publication*? What inference is justly deducible from such a fact—I mean, how far it impeaches the witness's *credit*, supposing it to be—is another thing: but it was clearly open to the party to have pleaded the fact itself, if he had deemed it a material fact, *before publication*; so that its being pleaded at the present time, *after publication* is improper, and, strictly, inadmissible. Where a witness has been designed to particular parts of a plea, it is always open to the other party to plead, *before publication*, declarations on his part, contrary to the facts and averments contained in those particular parts of the plea. Is the party to lay by till he has seen the witness's deposition, and then, *if convenient*, to plead them?

Certainly not. For instance, in the case of a subscribed witness to a will, examined on a *condidit*. Is the party opposing the will to wait till publication of the evidence has passed, and then to plead, that the witness has *said*, he "never attested the will," or as the case may be, in the shape of an exception to his testimony? I think that such declarations should have been pleaded, *before publication*—unless indeed they had "*noviter perventa*" newly come to the knowledge of the party pleading them, so averred, and so proved. Here there is no averment even, that these declarations of Hobbs have come to the knowledge of Mr. Atkinson, *since* the evidence has been published in the cause.

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But there are other objections strongly applicable to the admission of this article. In excepting to the credit of a witness from what arises out of his deposition, it has been always held, that you must shew him to have sworn *falsely*, and *corruptly*. Would it be matter of just inference, that the witness has sworn *falsely* and *corruptly*, in this instance, should the allegation, this part of it, be admitted, and proved? It assigns a contradiction which does not involve any material impeachment of the witness's credit, in my view of it. What the witness is said to have stated, differently, at different times, is not a matter of *fact*, but a matter of mere *inference* or *opinion*. In her deposition, she has spoken to her *belief*, that adultery *was* committed between the parties—at other times she has spoken to her *belief* (assuming this, for argument's sake) that it was *not*. But the witness may have entertained *different* impressions at *different* times—so that little derogatory to her credit would result from this part of the allegation being proved. The assigned contradiction is not one of that

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positive, and precise, nature, *alone* sufficient to *discredit* a witness. For instance—suppose that an interrogatory had been addressed to Hobbs to this effect. Have you never stated so and so [namely, your *belief*, that the defendant never committed adultery with Mrs. Rolls] either *generally*, or, *a fortiori*, *specifically*; that is, have you never *so* stated to such, or such, persons, and so on? Why, the witness might then, not improbably, have *admitted* that she had so *said*, and might have accounted for her having *deposed* differently; as for instance, by averring that she had *altered* her opinion as to the conduct of the parties; or that what she had *said* on that subject was not meant *seriously*; and that her real opinion and belief was only expressed when she was put upon her oath. Had she *denied* it, however, the assigned contradiction, as being positive and precise, might have been pleadable. But no such interrogatory *was* administered to her—and the discrepancy, *as* pleaded, being, accordingly, not one of a nature to affect her credit, *materially*, if proved, it ought not, I think, *to be* pleaded, were it upon this ground only. This witness's belief, either way, I may add, is obviously, itself, quite unimportant in the cause. Her *belief*, either way (she too, a mere girl) is no proof that adultery was, or that it was not, committed between the parties articulate. To what inference as to this, either way, is the *Court* led by the *facts*, and *circumstances*, to which she has deposed? *They* constitute the material part, the only material part, of her evidence. The Court can draw from these its own inference; in doing which it is likely to derive little aid from the belief, either way, of (especially *such*) a witness.

Lastly, the allegation, this part of it, is destitute of all that specification so absolutely essential where matter is pleaded to discredit a witness, *after* publication. It merely pleads, that the witness ~~has~~ stated so and so—not saying when, where, or to whom, in a single instance. How is this to be counter-pleaded; or how can interrogatories be addressed, with any effect, to the witnesses produced to prove such *alleged* declarations? In every view of the case, it appears to me that this first article of the allegation, is one that the Court is bound to reject.

Nor has the second, the only remaining, article of the allegation, in part for the same reasons, any better claim to be admitted. It recites the *answer* of the same witness, Hobbs, (to the effect that “she has not received, or been promised, nor does she expect to receive, any reward, present, gratuity, or satisfaction, for giving evidence in this cause,”) upon a *general* interrogatory addressed to her on that head. And it then pleads, not that she *has been bribed*, but, that she, Hobbs, since her examination, has admitted, and confessed, “that her father did receive money from Mr. Weddell, the solicitor of Mrs. Atkinson, for her use, and in order to supply her with clothes—that her mother had actually purchased clothes for her with such money; and *that* Mrs. Atkinson had furnished it.” Now these again are facts, namely, that the witness had been bribed, or at least had been tampered with, which, unless they are *noviter perventa* to the knowledge of the other party, which they are not averred to be, should have been pleaded *before* publication—and here again, with respect to *these* admissions and confessions, there is all that want of due specification of times,

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places, and persons, already observed upon, as with respect to the alleged declarations pleaded in the preceding article. Upon the whole, the plea now tendered, appears to me to be purely dilatory; and to be made up of matter not pleadable in this shape, and in this stage of the cause. Consequently, I reject it; and assign the cause itself to be concluded on the next Court-day.

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### PREROGATIVE COURT OF CANTERBURY.

3d Session.

ALLEN v. MANNING.

A testator made a will, to please his wife: then a second (unknown to his wife) to please himself: sometime after, he went to his attorney and gave him instructions for a new, or third, will—telling him, at the same time, that he was going, *that day*, to make a codicil to (and so, in effect, to revive) the first, terming it his wife's will; but would come, *the next day*, and execute the third, which he meant to be *his* will, expressly in order to defeat the first. He revived the first will, accordingly; but died without *executing* the third. The Court, holding that, upon the evidence, he was *only* prevented from executing this third will by the “act of God,” in the true sense of that phrase, pronounced for a *draft will* which had been prepared, in his life-time, from the *instructions* so given by the testator as aforesaid.

**THOMAS ALLEN**, the party deceased in this cause, died on the 16th of December, 1823, leaving personal property, *only*, to the amount in value of about 2000*l*. At the time of his death he was clerk to Messrs. Whitbread, and Co., and had been so for nearly forty years.

In 1806, the deceased being then a widower with two children, daughters, intermarried with Mary Huke, who survived him, being party in the cause as Mary Allen, his widow and relict. She, at the time of her marriage with the deceased, was a widow, and was possessed, in her own right, of certain freehold and leasehold property, and other effects, producing, together, an income of about 200*l*. per annum. The

whole of such property previous to the marriage was settled on her, for life; and afterwards, as she, by deed or will, should appoint. The deceased had issue by this marriage two children, a son, and a daughter, both minors, at the time of his death. His daughters by the first wife were both married in his life time.—Ann, the elder, (party in the cause) to Thomas Manning, in 1809—and Frances, the younger, to William Garnham, in 1822.

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In the months of February and March, 1821, the deceased made a will, with two codicils, whereby he bequeathed the bulk of his property to his then wife, for her life; and the whole, after her death, to his four children, in equal proportions. This will and codicils, together with a third codicil, (of which in the sequel) were propounded by the widow. It appeared in evidence that they were prepared by a solicitor, Mr. Earnshaw, whom the deceased was in the habit of employing, from his own instructions: and they were formally executed, and attested. It was expressly pleaded, on the part of Mrs. Manning, that the deceased was prevailed upon to execute the said will, *only* by the undue influence and importunity of his wife, the other party in the cause; and that the same was contrary to his real wishes and inclinations. But of such express allegation there was no *proof*; with the exception of the evidence to certain declarations to that effect made by the deceased himself, on two subsequent occasions, that will presently be stated.

In the month of June, 1822, the deceased executed another will, which had been prepared for him by a Mr. Hull, a solicitor in his neighbourhood, but not the solicitor regularly employed by the deceased, from

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instructions given by him, the deceased, to Hull in the month preceding. The deceased, it was pleaded and proved by the testimony of Hull, both on occasion of his giving instructions for, and on that of his executing, the said will, spoke in strong terms of the injustice of which, *as he said*, he had been guilty towards his two elder children by the will and codicils of February and March, 1821,—alluding to the property settled upon his then wife and, *as he expressed it*, upon her children; who, consequently, would be better provided for than his other children, in the event of that will remaining operative. On both such occasions the deceased added “It,” meaning the will of February, 1821, “is my wife’s will, and not mine.” Accordingly, by the will of June, 1822, the bulk of his property after his wife’s death was given by the deceased to his two elder children, in equal proportions, and a legacy only of 200*l.* each to the two younger, the children of the subsisting marriage. This last will was left with Mr. Hull, to be delivered to his executors after his death—the deceased assigning as a reason for this, that “it would occasion words if he took it home,” and that “he did not wish his wife to know of it.”

On the 10th of December, 1823, the testator called upon Mr. Hull, and told him in the presence of his clerk, a person named Dury, that he wished to make a *new* will; and desired that his will of June, 1822, should be read over to him. This being, accordingly, done, the testator proceeded to give instructions for a new will. Such instructions, as taken from the deceased by Dury, purported to be expressed in a paper writing, indorsed “Instructions for altering Mr. Allen’s will,” written by Dury; and in certain alterations noted in



pencil, also by Dury, on the margin of the former will. The general purport of the proposed will, for which instructions were so taken, was to be as follows. After the death of the testator's wife, his property was to be divided into thirds—a third was to be given to each of his two elder children; and the remaining third, in equal division, to the two younger. At the same time the testator directed (so positively deposed by Hull and Dury, and so purported to be contained in the instructions) that a note of hand for 200*l.* of his son-in-law, Manning, which the deceased held as a security for money lent him to that amount, should be *cancelled*; and that a further sum of 100*l.* also lent or advanced to Manning, by the deceased, but for which he had no security, should be retained by him, Manning, over and above a clear third of the residue, so proposed to have been given him by the will (a). The instructions so

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(a) The "instructions" only *purported* to express this, *sub modo*, being in these words.

Personal property to be divided into three shares.

1st share, to daughter Manning, *having had* 300*l.*

2nd, to daughter Garnham.

3rd, George Thomas Allen, and my daughter Mary Allen, spinster, now seventeen, all payable at my wife's decease.

Manning gave a note of hand for 200*l.* 1st January, 1823—100*l.* advanced before.

*Executor to cancel the note on payment of all interest.*

Remaining 3rd to be divided between George Thomas and Mary Allen.

Receipt of wife a sufficient discharge.

*Cancel note.*

Now it certainly might have been a question of *construction*, on the face of the instructions *propounded*, whether the testator meant and

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taken, as above, when completed, were read over to the deceased, who approved of them, and directed that a will should be drawn out conformable thereto, in order that he, the deceased, might execute the same, on the following day, at Hull's office, by way of concealing all knowledge of the transaction from his wife. The deceased, at the same time, said "I am going to execute *another* will at home, to day, prepared by Mr. Earnshaw; but it will not be my will—it is not just, it is not right, but I will do it to preserve peace at home. "I will come to morrow and sign *this* will which will overturn the will that I am going to sign to day at home." These declarations of the deceased were positively deposed to by Hull and Dury.

On the 11th of December the deceased executed, at

intended that his son-in-law, Manning, should have a third of his property *plus*, or *minus*, the sum of 300*l.* which he was so indebted to him. And there was *much* in the evidence to shew, that, whatever benefit the testator meant and intended to Manning, it was *always* his intention to make him account to his estate for this sum of 300*l.* which he had so had in advance. The Court, however, instead of pronouncing for the instructions propounded, which had been read over to, and, as sworn, approved by, the deceased, pronounced for the draft will, prepared by Hull from those instructions, which the deceased had never seen; and which only appeared, as a *script*, in the cause, annexed to Mrs. Manning's affidavit of scripts. Upon the face of the paper so actually pronounced for, there was no such ambiguity; it being there expressed, clearly enough, that Manning was to have a third, over and above the 300*l.* which he was indebted to the testator; and Hull and Dury positively deposed (and no doubt, understood and conceived) that *such* was the deceased's intention. It was objected on the part of the widow, that it was not competent to the Court, under these circumstances, to pronounce for a paper which had never been seen by the deceased—but the Court over-ruled that objection; and actually pronounced, as said, for the draft will.

his own house, a codicil to his will of February, 1821. Such *codicil* was, unquestionably, the instrument referred to by the deceased, as a *will*, in his declarations to Hull and Dury: it was to have been executed on the 10th, and its execution was merely deferred till the 11th, by reason of a press of business in the attorney's office, which prevented its being completed, as originally proposed, on the first of those two days. It was prepared by Mr. Earnshaw, from instructions which the deceased had, *himself*, called at his office, and given to him, on the 9th of December. The sole purport of that codicil was, to secure the return to his estate of the 300*l.* which the deceased had lent, or advanced, to his son-in law, Manning. In order to this, it directed that the said sum of 300*l.* should be taken, and considered, as part of the fourth share to which Mrs. Manning was entitled, in, and by, the will of February, 1821: and the codicil in question confirmed the said will, that of February, 1821, and the two former codicils, in all other respects. It was pleaded on the part of Mrs. Manning, that this codicil was only procured from the deceased, as the will had been, by the undue influence and importunity of his wife: but of this, again, there was no other proof than resulted from the deceased's *previous* declarations to that effect, to Hull, and his clerk, Dury.

On the said 11th of December, the deceased, who had long been afflicted with cough and asthma, feeling himself worse, sent for his apothecary; by whose advice he staid at home on that day: nor did the deceased, in fact, ever quit his house, after the 10th of December. He died in the night of the 16th. It was pleaded on the part of Mrs. Manning, that he was

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incapable of quitting his house after the 10th, and, consequently, of fulfilling his engagement with Mr. Hull. On the contrary it was pleaded by the widow, that the deceased, although indisposed on the 11th, and gradually getting worse till he died, still was down stairs *each* day ; and *might*, if he had chosen, have gone to Hull's office, situate only 200 yards from his own house, *any* day, previous to the 15th. And Mr. Gore, his apothecary, deposed to this part of the widow's plea, that he had recommended the deceased to stay at home on the 11th, merely as a matter of precaution, there being no actual necessity for his staying at home on that day ; and he, the deponent, having frequently seen him out, and employed in his ordinary pursuits, when he was worse—that on the 12th, he was much better than on the 11th—and that his illness only assumed an alarming character, and was only considered by the deceased himself, and by those about him, likely to be fatal, on the evening of the 14th December.

The will (and its three codicils) of February, 1821, was propounded on behalf of the widow—and the will of June, 1822, in conjunction with the pencil notes on its margin, and the instructions taken by Dury, as above, on the 10th of December, 1823, was propounded on behalf of the daughter, Mrs. Manning.

#### JUDGMENT.

SIR JOHN NICHOLL.

The evidence taken upon the several allegations leaves no doubt upon my mind, either as to the intentions of this testator, or as to the legal construction to be put upon his several testamentary acts.

The testator made a will in 1821, leaving his property to be divided among his children in equal

proportions. It was prepared for, and executed by him, under circumstances, and in a manner, as appears by the evidence, which negative the imputation of improper interference on the part of the wife, or any other, of a nature in the slightest degree to affect the legal validity of that will. He might have made it to please his wife; and even at her instance, and through her importunity: still nothing of all this appears in the evidence, of a nature at all, I repeat, to affect the legal validity of the will. However, in the month of June, 1822, the deceased makes a new will, through the agency of another solicitor, of a somewhat different tenor from the former: and by this, of itself, and quite independent of any declarations as to his dissatisfaction with that former will, and so on, the will of 1821 clearly stood revoked. This will of June, 1822, would indisputably, have been entitled to probate, had the testator died without doing any other, or further, testamentary act.

Next in order of time follows the codicil of December, 1823; it was to have been executed on the 10th, but was actually executed on the 11th of December. It confirms, and revives, the will of February, 1821; and that again, *so far*, became the deceased's *last*, or effective will. Undue influence and control on the part of the wife is here, again, charged: but of such, here again, there is no proof, of a nature to affect the validity of the act, or to prevent its operating as a complete and effectual revivor of the will of February, 1821—and the Court, if matters had stopped here, must have so considered it.

But it also appears that on this 10th of December,

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the very day upon which the codicil reviving the will of February, 1821, was to have been executed, the deceased goes to Mr. Hull and gives him instructions for a new will, altogether; accompanying those instructions with declarations that he is going to execute, that day, at home, a will of a different tenor, prepared for him by Mr. Earnshaw; but that he will call on the following day, and execute a will prepared from the instructions so *then* given by him, expressly in order to defeat the will that he is going to execute, that same day, at home. And the case set up by the daughter, Manning, is that these instructions, and accompanying declarations, *under the circumstances*, are sufficient in law to defeat the *actual* revival of the first will.

Now it neither has been, nor could be, contended, that these instructions and declarations could have the effect sought to be ascribed to them, *of themselves*. Accordingly, it is further alleged, on the part of Mrs. Manning, that the deceased would actually have fulfilled his promise of calling at Hull's office, and executing the proposed will, if he had not been prevented from doing so by what is technically described as the "act of God." This is the daughter's case: and, I admit, as insisted, that in order to sustain it, she is bound to satisfy the Court in the three following particulars. First, that the deceased fully meant and intended to *execute* a will of the same tenor with that which he directed to be *prepared* on the 10th of December. Secondly, that he was only prevented from carrying that intention into effect by extrinsic circumstances. And, thirdly, that those extrinsic circumstances were such as he, himself, had no control over;

amounting in themselves, to what this Court is in the habit of considering a case of prevention by the "act of God."

Is the evidence such, then, as should satisfy the Court as to these particulars? Now as to the two first, I am quite persuaded, from the deceased's own declarations, and from the circumstances under which the several wills were executed, as both the one, and the other, appear in evidence, that it was not his intention to bequeath his property to his four children in equal proportions; but that he did intend, and had long intended, a distinction in favour of his children by his first wife, in consideration of what those by his second wife would, *probably*, derive from the money in settlement at *their* mother's disposal. The wife's interference, I have said, is not proved so as at all to invalidate, either the will of 1821, itself, or the revival of it by the codicil of December, 1823, viewing those several testamentary acts *in themselves*. But it is shewn, to a quite sufficient extent to satisfy my mind, that the codicil of December, 1823, may justly be *so far* ascribed to the husband's anxiety to "*preserve peace at home*" as he expressed it, that the *actual* revival of the will of February, 1821, by means of that codicil, is not at all *incompatible* with the case set up, that the deceased fully meant to execute a will of a different tenor to that so revived by the codicil, on the next immediately following day. And viewing this in connection with the admitted facts of the case, and the testator's own positive declarations to that effect, as deposed to by Hull and Dury, on the 10th of December, I think I am bound to conclude that his mind was made up to execute *the* will now, in substance, propounded on

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behalf of the daughter : and that he was only prevented from so doing by extrinsic circumstances.

The sole remaining consideration is, whether those extrinsic circumstances do, or do not, constructively, amount to, and constitute, a case of prevention by the "act of God," as the Court is in the habit of construing that phrase? Now in order to this it is not necessary that a case of *physical* prevention should be made out. In the case in question, for instance, it is not necessary to be shewn that it was actually, or even, morally, *impossible* for the deceased to have gone to Hull's office on the 12th of December. If the Court is convinced upon the evidence that he was prevented from going by extrinsic circumstances, of such a nature, as render his failing to keep his engagement with Hull not justly imputable to any *change* of intention on his part, the exigency of the law, in the particular in question, appears to me to be fully satisfied. And I do think the fair result of the evidence is, that the deceased *was* solely prevented by the "act of God," in this sense and construction of the phrase, from executing the will now, in substance, propounded by Mrs. Manning. It is admitted that he never left his house after the 11th of December; and it is proved that he staid at home, on that and the subsequent days, by the advice of his medical attendant. His disorder was asthma, accompanied by a violent cough, and tendency to inflammation; though no symptoms of this were, perhaps, actually discoverable by those about him till the 13th or 14th. The time of year (the middle of December) makes it apparent that such a patient must have left his home, at considerable risk, even to go 200 yards, the distance to Hull's office. It has been said, that



Hull might have been sent for. But the deceased had himself told Hull (so he deposes) that he did not dare send for him: and as the deceased got weaker and worse, he, probably, felt himself more and more unequal to that breach of *domestic* peace which he, at least, apprehended, that his sending for Hull upon such an errand would surely occasion. Under these circumstances I hold that I am bound to carry into effect what I feel to have been the testator's real intentions, by pronouncing for the instructions propounded by Mrs. Manning; in preference to pronouncing for the will of February, 1821, as revived by the codicil of December, 1823, propounded by the widow (a).

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(a) The Court, *in fact*, pronounced for the "draft will" prepared from those instructions (propounded, under its directions, *apud acta*) and not for the instructions themselves, as already said. See note (a), page 493.

LYON and WERRINGTON v. BALFOUR and others.

By-Day.

(*On Petition.*)

**WILLIAM SIBBALD**, a domiciled Scotchman, died sometime in the year 1817, at Edinburgh, leaving a will and codicil, which were duly proved by his executors, one of such executors being Mr. Balfour, in the proper Court in Scotland, on the 19th of December, 1817.

A creditor cites an executor to accept or refuse probate, &c. The executor, *sub modo*, denies the jurisdiction of the Court, as not having any

knowledge of *assets*. The creditor then, in order to found the jurisdiction, is compelled to disclose *assets*; whereupon, the executor, retracts his *qualified* denial of the Court's jurisdiction, and prays probate. Probate decreed to the executor, with *costs*; as incurred solely by reason of the creditor's *undue* suppression of the fact of there being *assets*.

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In the month of March, 1824, a decree by letters of request, issued under seal of this Court, at the instance of two creditors of the deceased, Messrs. Lyon and Werrington, citing the executors to accept or refuse probate of the said will and codicil in this Court, with the *usual* intimation.

This decree, having been duly served, was returned in Court, when the executors appeared, and, *sub modo*, denied the jurisdiction of the Court, by reason, as alleged in their act of Court, that the deceased had, whilst living, and at the time of his death, no "goods, chattels, or credits within the province of Canterbury sufficient to found the jurisdiction of the Court," to their knowledge and belief—offering, at the same time, and alleging that they were ready and willing, to take probate of his will and codicils in this Court, on being satisfied to the contrary.

The creditors, upon this, were compelled to disclose in their act of Court in reply to that of the executors, in order to found the jurisdiction of the Court, that the sum of about 60*l.*, being a dividend of one shilling in the pound upon about the sum of 1200*l.* due and owing to the deceased, on simple contract, from a mercantile house in this town, which house had become insolvent in the year 1812, was now in the hands of a trustee of the said insolvent's estate; which dividend the said trustee was ready to pay to any legal representative of the deceased, who was duly qualified, as such, to give him a legal discharge for the same.

The executors, hereupon, retracting their *qualified* denial of the jurisdiction of the Court, and praying probate, the question had now simply become one of

costs—the executors praying that the creditors might be condemned in costs, and the creditors, the executors—as also that their *further* expences in the premises might be decreed to be paid out of the testator's estate.

COURT,

Sir JOHN NICHOLL.

I have no hesitation, either in rejecting the prayer of the creditors, altogether, or, in condemning them in costs, as prayed by the executors. The amount of property recoverable under a probate taken here, is only about 60%. The executors if apprized that *any* property was recoverable would, at any time, have taken probate; they so allege, and the Court is bound to believe them. Under these circumstances, a *formal decree*, citing the executors to accept or refuse probate, and so on, was an abuse of the process of the Court; the expence consequent upon which ought, of course, to be borne by those to whom that abuse itself is imputable; I mean the creditors. The creditors have, themselves, given occasion to the whole, by their *undue* suppression of the fact of their being *assets* here—a fact, at last, only extorted from them by the *necessity* which they were under of disclosing it, in order to found the jurisdiction of the Court. And their motive for all this has been, to become the legal representatives of the testator within this jurisdiction; in order to apply this sum of 60% in discharge of their own debt, to the manifest prejudice of all the other creditors of this avowedly insolvent estate. The executors are entitled to probate of this will and codicil of course: and I think myself bound to condemn the creditors in the costs of obtaining it to which the executors have been put, through *their* means.

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In the goods of the Rev. CAVALIER JOUET, deceased.

The statute 38 Geo. III. c. 87, though entitled only "an act for the better administration of assets where the executor to whom probate has been granted is out of the realm," is equally applicable where an executor, (though not "out of the realm,") is out of the jurisdiction, and out of the reach of the process, of his majesty's English Courts of law and equity.

**T**HE Rev. Cavalier Jouet, deceased, died in the year 1810, having first made his will, of which he appointed two executors. Probate of this will was granted to one of his two said executors; power being reserved of making a similar grant to the other: and, on the death of that one, probate was actually so granted to the other, in the month of June, 1822. The surviving executor was living in England at the time of the grant; but left it some time after, and settled at Stirling, in North Britain, or Scotland.

Under these circumstances, administration of the effects of the said testator was granted to the nominee of a creditor, limited to the purpose of his "becoming" and being made a party to a bill or bills to be filed "against him in a Court or Courts of equity," and to that of "his carrying the decree or decrees of the said Court or Courts into effect, but no further, or otherwise," under the provisions of the statute 38 Geo. III., c. 87 (a).

(a) Any possible doubt with respect to the *propriety* of this grant as by reason that the executor was resident "in Scotland" at the time, and not "out of the realm;" might have been obviated by what occurred in the following case of *Hannay v. Taynton*, determined by Sir William Wynne, in Easter Term, 1800.

## HANNAY v. TAYNTON.

IN March, 1798, probate of the will of John Hannay, Esq., deceased, was granted to Johnstone Hannay, Esq., the sole executor; who having gone to reside in Scotland, a *limited* administration (with the will annexed) pursuant to the provisions of 38 Geo. III., c. 87, was granted to the nominee (Taynton) of one of the residuary legatees named in the said will.

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In December, 1799, a citation issued at the instance of the executor, calling upon the administrator to bring in the administration, and to shew cause why it should not be revoked; as not duly granted *within* the statute—expressly by reason that he, the executor, was resident in “Scotland” at the time of the grant, and not “out of the realm.”

An appearance was given for the party cited; and both parties wrote to an act on petition—the question being, the propriety of the grant, solely as with reference to the executor’s domicil, or place of residence at the time of its issue.

The question so raised was determined by Sir William Wynne, (the then judge of the Prerogative Court,) on the 30th of April, 1800. He pronounced, upon argument, in favour of the grant, as clearly of opinion that the act was equally applicable to the case of an executor resident *out* of the jurisdiction, and out of the reach of the process of, (a) his majesty’s *English* Courts of law and equity, as to that of an executor resident “*out of the realm*.” Indeed, upon reference to the act itself, it should seem to admit, this; of but little question; although, the “*title*” of the act is only—“an act for the administration of assets in cases where the executor to whom probate has been granted, is “*out of the realm*.”

(a) See Done’s case, 1 P. Wms.



# TABLE

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## ADMISSIBILITY OF PLEAS.

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## ADULTERY.

1. Adultery committed by either party, (husband or wife,) *at any time BEFORE sentence*, will bar a sentence of separation, at the suit of the other party: or, will compel the Court to dismiss both parties, adultery being mutually charged. And Courts *must* permit either of such parties to plead adultery against the other, in any stage of such a cause; whether before, or after, publication, and how long soever this may have passed; if pleaded within a reasonable time after having first come to the proponent's knowledge. *Brisco v. Brisco.* 259
2. Adultery AFTER sentence, does not place the *other* party in a condition to object it, in order to make it the foundation of a prayer for restitution of conjugal rights. *Ibid.* 264, n.
3. If a deed of separation be so worded as RIGHTLY to found a presumption that it might (so intended) go to sanction, even, adultery committed by the wife, living apart from the husband under that deed; that presumption must be rebutted by evidence to entitle the husband to a sentence of divorce as by reason of such adultery committed by the wife. *Barker v. Barker.* 285
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But on appeal, the alimony runs from the date of the sentence appealed from; and not from the mere return of the inhibition. *Brisco v. Brisco.* 261
4. It is incompetent to the Court, under *any* circumstances, to make a formal allotment to the wife of any sum, in the nature even, or as on account, of alimony, until a *fact* of marriage, at least, is either proved *against*, or admitted *by*, the husband. *Smyth v. Smyth.* 254

5. The husband's liability to (payment of the wife's costs, and therefore, *a fortiori*,) to aliment the wife *pendente lite*, is only on the (general) presumption that *he* has property; the wife *none*. But if *contra*; that liability ceases. *Greg v. Greg.* 276, *Ibid.* 285, n.

## ALTERATIONS (IN A WILL).

The Court will not decree probate, even in common form, of alterations in a will so made as in themselves, and on the face of them, to be only cursory and deliberative upon *affidavits*: where it appears doubtful whether any attainable *proof* of what appears of their history in such affidavits would justify the Court in *pronouncing for* the alterations, if regularly *propounded*, as parts of the testator's will. *Re Rolls, deceased.* 316

## ANSWERS.

"Personal answers" are not confined to being mere echoes of the plea, accompanied with simple affirmances, or denials: but the respondents are, *further*, at liberty, to enter into all such matter as may *fairly* be deemed not more than sufficient, to place the transactions as to which their answers are taken, in what they insist to be the true and proper light. *Oliver and Tuke v. Heathcote.* 35

## APPEAL.

1. If an appearance be given under protest to an inhibition, which discloses an appealable grievance on the face of it, without, at the same time, so disclosing any peremption of the appellant's *right* to appeal there-  
2 x 2

## 510 ATTESTATION CLAUSE.

from, the Court will, at once, without any reference to the *merits* of the appeal, over-rule the protest, and direct an absolute appearance, generally, with costs. *Greg v. Greg.* 276

2. Note 1. That praying a judge to rescind an order, peremptory any after appeal from that order. 2. That his refusing to accede to such prayer is not, itself, an appealable grievance: any more than is—3. His refusing to permit witnesses to be examined "*on the day assigned to propound all facts*;" even though such witnesses are actually in Court, and sworn to be necessary witnesses. *Ibid.*
3. All the several *acts* done on one Court-day, make up but one *decree*—at least so as to warrant the appellant's including the whole, (whether of an appealable nature or not) in the *preesertim* of appeal; and so, to warrant the *inhibition's* going to the whole. *Ibid.* 284
4. The appeal from a bishop's "*commissary*" by the law of this country, under the statute of appeals, lies, not to his diocesan, but to the metropolitan. *Secus* by the canon law. *Burgoyne v. Free.* 405

## APPEALS, (STATUTE OF).

*Burgoyne v. Free*, 408.

## ARCHES COURT OF.

*See* BRAWLING, 2.—REQUEST.

## ATTESTATION CLAUSE.

A regular attestation clause, without any subscribed witness, affords but a slight presumption against the legal validity of a testamentary paper, perfect in other respects: but that presumption is infinitely slighter, where the writer's inten-

## BIGAMY.

tion to have it regularly attested, is to be collected only from the single word "*witnesses*" at the foot of the paper. *Doker v. Goff.* 42  
*Quare*, whether a paper so circumstanced can, in *all* cases, be considered an imperfect paper, so as to let in evidence against it? And note to what that evidence must, at all events in *some* cases, be confined. *Ibid.*

## ATTESTING WITNESSES.

A will pronounced for—*against* the evidence of two out of three, attesting witnesses. *Landon v. Nettle-ship.* 245.  
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## ATTORNEY.

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## AVERMENTS IN PLEAS.

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## BIGAMY.

1. If A. be convicted of bigamy as by reason of his marriage with C., living, B. his first wife, it is still competent to A. on C.'s death, to propound his interest as the *lawful* husband of C., in a suit in the Ecclesiastical Court, touching the administration of her effects; and to succeed in such suit, on proof shewn; notwithstanding his said conviction for bigamy pleaded and proved. *Wilkinson v. Gordon.* 152
2. It is competent to a party to set up the nullity of a first marriage, in bar of a sentence prayed of the nullity of a second marriage, by reason of that first; though he is

## CANCELLATION.

*convict* already of bigamy in respect of the said two marriages.  
*Bruce v. Burke.* 471

## BONA NOTABILIA.

See COSTS, 2.

## BOND (ADMINISTRATION).

See ADMINISTRATION, 5, 8.

## BRAWLING.

See VESTRY.

1. Brawling may be by reading a "notice of vestry" in church, during divine service, without due authority. *Dawe v. Williams.* 130
2. A suit for brawling may be, in the Court of Arches, by "letters of request," notwithstanding the "bill of citations;" and although the statute of Edw. 6, limits the proceeding to be "before the ordinary of the place, where the offence was committed." *Ibid.* 136
3. In all cases of brawling, &c. in church, where two parties are implicated, which is most to blame is, nearly, immaterial: each is bound to abstain; and each failing to abstain, incurs a like penalty. *Palmer v. Roffey.* 141. *Palmer v. Tijou.* 196. *England v. Hurcomb* and others. 306
4. *Quare*, whether one who chides and brawls in a vestry room, which is partly in, and partly out of, a church-yard, incurs thereby the penalties of 5 and 6 Edw. 6, c. 4, s. 1. *Williams v. Goodyer.* 463

## CANCELLATION.

See REVIVAL.

If a testamentary paper proved to have been duly made, is not found

## CAPACITY (TESTAMENT-ARY).

upon the death of the testator, having been left in his possession; the presumptions are that he cancelled it, and that he cancelled it, *animo revocandi*—but those presumptions may be repelled. Hence the substance of a testamentary paper may be pronounced for in the absence of the paper itself, upon satisfactory proof; 1st. that it was duly made. 2nd. that (even if cancelled) it was not revoked by the testator, *Davis v. Davis.* 223

## CANONS OF 1603.

*Quare*, whether the 48th canon be not solely applicable to ministers "taking permanent cures," without the ordinary's allowance—so that a minister officiating, in any place, by doing mere casual acts of duty, without such "allowance," is not responsible as for a breach of the 48th canon. *Gates v. Chambers.* 177

Original text (the latin) of the canons of 1603, to be consulted in any case of ambiguity. *Ibid.* 189, n.

CANONS 49, 50, 52. *Ibid.* 191, 192.

## CAPACITY (TESTAMENTARY).

See DELIRIUM.—DRUNKENNESS.—INSANITY.—INSTRUCTIONS, 2.—PLEADINGS, 6.

Allegation propounding a testamentary paper rejected for this, among other reasons—as not pleading facts of a nature to satisfy the Court, if proved, that the deceased was of testamentary capacity equal to the act, at the time of the act done. *Montefiore v. Montefiore.* 365, 371

## 512 CITATIONS, BILL OF.

### CERTIFICATE (OF MARRIAGE).

See MARRIAGE CERTIFICATE.

### CHIDING.

See BRAWLING.

### CHURCH.

An application for a faculty to take down a church (*so styled*) absolutely, acceded to; under the peculiar circumstances, of the building being in a state of dilapidation; and of there being no person or persons compellable by law to restore and uphold it. *St. Martin Orgars*, case of. 255

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## CORRECTION OF CLERKS.

### CITATION.

See ADMINISTRATION 9.—PROCESS.  
—DECREE TO SEE PROCEEDINGS.

### CODICIL.

1. The ordinary presumption is that a codicil to a will is revoked by the revocation of that will—but it may be rebutted by circumstances shewing that the testator meant it to stand. *Medlycott v. Assheton*. 229
2. A will and codicil pronounced for; and three intermediate codicils disallowed—the Court holding them, upon the evidence, not to compose a part of the deceased's testamentary intentions. *Greenough v. Martin*. 239
3. A codicil pronounced for as contained in an affidavit of scripts. *Davis v. Davis*. 227, n.
4. A codicil to a will effectually republishes that will; so as to repel any legal presumption whatever adverse to the will, taken *per se*. *Gibbens v. Cross*. 455

### COMMISSARY.

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### COMPARISON OF HANDWRITING.

See HANDWRITING.

### CONCLUSION OF CAUSE.

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CONCLUSION OF CAUSE.

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## CORRECTION OF CLERKS.

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## CRUELTY.

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1. A defensive allegation in a criminal suit may be admitted to proof, if the facts pleaded have a probable tendency to render the case charged, one for *mitigated costs*, on that ground only. *Gates v. Chambers*. 177
2. A creditor cites an executor to accept or refuse probate, &c.—The executor, *sub modo*, denies the jurisdiction of the Court, as not having any knowledge of *assets*. The creditor, then, in order to found the jurisdiction, is compelled to disclose *assets*; whereupon the executor retracts his *qualified* denial of the jurisdiction of the Court, and prays probate. Probate decreed to the executor with *costs*; as incurred solely by reason of the creditor's undue suppression of the fact of their being *assets*. *Lyon and Werrington v. Balfour*. 501

## CREDITOR.

See ADMINISTRATION, 9. — INVENTORY, 2, 6.—COSTS 2.

## CRUELTY.

See RESTITUTION OF CONJUGAL RIGHTS, 1, 2, 3.

1. Cruelty may be, sufficient to found a sentence of separation, without

## DECREE TO SEE PROCEEDINGS.

actual personal violence. *Hulme v. Hulme*. 27

2. The only legal remedy, in case of ill treatment, of the wife by the husband, or the husband by the wife, is a proceeding for a divorce by reason of cruelty. And if the conduct of the party complained of, fails to amount to *legal* cruelty, the complainant, however ill treated, is still without *legal* redress. *Orme v. Orme*. 382

## CURATES (LICENSED).

1. *Quere*, whether removeable at the incumbent's pleasure; or not without the ordinary's license revoked. *Gates v. Chambers*. 177
2. The *assistant* curate of a *resident* incumbent, though licensed, is not entitled to the benefit of a summary process by *monition*, &c. for the recovery of his stipend in arrears, under 57 Geo. III. c. 99, s. 53, 193, 196, n.

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Of testators, 75, 76, 128, 225, 226.  
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## DECREE TO SEE PROCEEDINGS.

In a cause of divorce where the alleged marriage is denied to be valid, the Court may, *probably*, permit third parties who have estates expectant (*inter alia*) upon the issue of such alleged marriage being illegitimate; and who consequently are interested in the question of its validity, to be *cited* to "*see proceedings*" in the cause, "*so far as relates to the marriage*." *Montague v. Montague*. 372

## DELIRIUM.

How distinguished from *proper* insanity. Patients, *properly*, insane often rational to all outward appearance, without any *real* abatement of malady. But in a case of mere delirium, in the absence, of that temporary excitement which produces it, to be *ascertained* by the appearance of the patient, the patient, most commonly, is *really* sane. Hence, a *lucid interval* is much easier to be proved in a case of delirium, than in one of *proper* insanity. *Brogden v Brown*. 441.

## DISPOSITION.

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## DIVORCE.

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## DOMICIL.

1. The succession to the personal estate of a British subject, dying, domiciled, in any part of the British empire, *intestate*, is to be regulated by the law of that part of the British empire which was his domicile at the time of his death. But, *quare*, whether a British subject *can* select a *foreign* domicile in so complete derogation of his British, as to subject his property *here* to distribution according to any *foreign* law, even in case of his intestacy: though admitting this to be, it would by no means follow that his *will* to be

valid *here* must conform to that foreign law; either on principle, or on precedent. The rule that where property is to be distributed under a certain law, in a case of intestacy, it must be so distributed in the absence of a will, valid by that law, only applies to cases, in which, there being no *conflict* of domicils, the law which must govern the case, whether one of testacy or intestacy, admits of no question. *Curling v. Thornton*.  
*Per tot.* 6

2. On the validity of a will made by a domiciled inhabitant of Scotland, the Court here will defer to the law of Scotland; and will pronounce in favour of that will or for an intestacy, according as that question is determined by the Scotch Court of Probate. *Hare v. Nasmyth* 25, n.

## DRUNKENNESS.

A case of insanity *alleged* to defeat a will—testator proved not to have been, properly, a madman, but an habitual drunkard, who, under the excitement of liquor, acted, in all respects very like a madman—different considerations applicable to the two cases, as with relation to the matter in question stated: testator held (on the evidence) to have been sober at the time of making his will, and the will consequently, sustained. *Ayrey v. Hill*. 206

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1. Evidence of a witness whose *moral* character, in a particular

## EXCEPTIVE ALLEGATION.

transaction, has been successfully attacked, liable to what impeachment. 66

2. Evidence of a witness who comes forward in consequence of an advertisement offering a reward, what considerations are applicable to. *Poole v. Sacheverell.*

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3. Evidence of witnesses deposing against their own act, how to be regarded. 247, 451.

4. A record of conviction is evidence of the same fact, if it afterwards come, collaterally, in controversy in a civil cause, only it is not conclusive evidence. *Wilkinson v. Gordon.* 157 et seq.

5. *In judicio non creditur nisi juratis.* Hence the certificate of the king himself, under his sign manual, no evidence of a mere fact. 391

6. A witness under cross-examination, is compellable, if required by the ministrant, to produce all written communications addressed to him by the solicitor, or other agent, of the producent, relative to his examination as a witness in the cause. *Atkinson v. Atkinson.* 468

## EXCEPTIVE ALLEGATION.

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1. Any fact must not only be *pleaded* more restrictively in an exceptive allegation, than before publication; but it must also be more strictly *examined* to. 171.
2. A prayer to the Court to rescind the conclusion of a cause, for the purpose of receiving an exceptive allegation, rejected, on this, among other grounds, namely, from its appearing extremely doubtful to the Court, for reasons stated, whether any exceptive allegation would

## FEME COVERT. 515

have lain to the testimony of the witnesses proposed to be excepted to, even before the cause was concluded. *Durant v. Durant.* 273

3. An allegation, exceptive to the testimony of a witness, to be admissible, must plead matter not pleadable *before* publication: and it must be such as, if proved, will *materially* discredit the witness. It must be pleaded too, with all possible specification as to times, places, persons, &c. *Atkinson v. Atkinson.* 484

4. Where a witness is designed (*a fortiori*, vouched) by the one party to *precise* facts, it is open to the other party to plead *before* publication, *declarations* of the witness contrary to those facts—which, if he does not, he shall not plead them *after* publication, in exception to the testimony of the witness; unless they are “*noviter perventa*,” &c. *i. e.* come to his knowledge *since* publication. *Ib.*

## EXECUTORS.

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## FACULTY.

### TO TAKE DOWN A CHURCH.

See CHURCH.

### TO APPROPRIATE A PEW.

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## FEME COVERT.

The Court on cause shewn will permit a married woman, party in a cause, to appoint a proctor, &c., in the absence of her husband; on giving reasonable security to the other party, as to his costs.

*Suter v. Christie.* 151

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### FORNICATION.

*Quare*, whether clerks in orders are not liable to suits for fornication, or incontinence, (in order to their suspension or deprivation) without *any* limitation in point of time; although the stat. 27 G. 3, c. 44, *expressly* says, that "no suit for fornication or incontinence *shall* be brought, *after* the expiration of *eight* months from the time when the offence shall have been committed." *Burgoyne v. Free.* 414

### HANDWRITING.

Evidence in proof of the direct charge of the signature to a will propounded, being a forgery, stated, and fully discussed: and the *general* doctrine with respect to "evidence of handwriting," explained with a good deal of particularity, incidentally, in the course of that discussion. *Robson v. Locke.*

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### IMPERFECT PAPERS.

*See* ATTESTATION CLAUSE.

An *imperfect* paper, which is imperfect in *other* respects, as well as in that of its being *unexecuted*, is regarded by a Court of probate in quite a different light from an imperfect paper, which is *only* imperfect in respect of its being unexecuted. The presumption of law is against either; but it is much slighter and more easy to be repelled against a testamentary paper which is only "*unexecuted*," than against one which is both *unexecuted and imperfect* in *other* respects. The Court will *presume* the testator's "*intention*" to be with the one; upon its not being executed being so accounted for

## INSTRUCTIONS.

as to rebut the presumption of *abandoned* intention. But the testator's intention must be *proved* to be with the other to entitle it to probate; in superaddition to its imperfect, *and* unexecuted, state being satisfactorily accounted for. *Montefiore v. Montefiore.* 354

The legal presumptions against imperfect testamentary papers of *every* description are stronger or weaker, nearly in exact proportion to the degree of maturity at which those papers have arrived. 357

### INCONTINENCE.

*See* FORNICATION.

### INHIBITION.

*See* APPEAL, 1.

An appearance under protest to an inhibition is an experiment, which, if unsuccessful, subjects him who makes it to *costs*, without any reference to the merits of the appeal. *Greg v. Greg.* 276

### INCAPACITY.

*See* CAPACITY.

### INSANITY.

*See* DELIRIUM.—DRUNKENNESS.

Insanity *alleged* to defeat a will—*partial* insanity *principally* relied on, though *general* insanity *also* alleged. *Dew v. Clark and Clark.* 102

## INSTRUCTIONS.

*See* UNEXECUTED WILL.

1. Instructions may be *presumed* from the conduct of the party to whom they are pleaded to have been given, and from that of the several other parties engaged in



the same *general* transaction, without any direct proof. *Brogden v. Brown*. 449

2. The rule that where capacity is at all doubtful, there must be *direct* proof of instructions only applies with any stringency where the instrument propounded is inofficious, or obtained by one whom it purports materially to benefit: it has little or no application to a will procured through disinterested agency, and the dispositive part of which is consonant with the testator's natural affections and moral duties. *Ibid*.
3. A draft will from "instructions" pronounced for; the Court holding that the testator was only prevented from executing a will conformable thereto, by the "act of God," in the true construction of that phrase. *Allen v. Manning*. 490

### INTENTION.

See IMPERFECT PAPERS:

- A Court of *probate* will collect the intentions of a testator as to what instruments shall operate as, and compose his, will, from all the circumstances of the case taken together—not from the mere contents of the instruments themselves. *Greenough v. Martin*. 239

### INTEREST.

- In interest causes where the suitor, whose interest has been denied, succeeds in establishing his interest; costs follow, almost of course, without some *special* ground of exemption. *Northey v. Cock*. 294

### INVENTORY.

1. The executors of a deceased executor, though not the personal representatives of the original tes-

tator (there being an executor of the original testator still surviving) are compellable to bring in an inventory of the effects of the original testator. *Gale v. Luttrell*. 234

2. The Court will compel an inventory, &c. at the suit of a creditor by *bond*; notwithstanding its alleged invalidity (that of the bond); and a suit as to this actually depending at common law. *Ibid*. 234
3. An executor (*at least* one who has a *special* interest; but, probably, an executor *as* executor *merely*) may call upon his co-executor for an inventory. *Paul v. Nettlefold*, 237. *Huggins v. Alexander*. 238, n.
4. Where objections to an inventory given in on oath by an executor are taken by one only, of various parties, equally interested in the effects of the testator: and where the disclosure of *assets* sought refers back to transactions pretty remote in point of time—under such (and, by parity of reason, under similar) circumstances, the Court will presume the inventory to be correct, without *strong* grounds laid to induce a *contrary* suspicion. *Hunter v. Byrn*. 311
5. A creditor or legatee *may* object to an inventory given in by an executor or administrator; and may file an allegation pleading "*omissa*" in order to take the answers of the executor or administrator; though he may not go on to examine *witnesses* to falsify the inventory. *Telford v. Thomas*, 319. *Shackleton v. Lord Barrymore* 329
6. The Court is not *merely ministerial* in the matter of inventories under the statute of Hen. VIII., though there are two cases, in

- prohibition, in the Court of King's Bench, seemingly to the effect (one, at least, of them) *as reported*, that it is so (*merely*) *ministerial*. So deeming, the Court will go on to entertain objections to inventories, as above, till it is more fully assured, that the *advised* judgment of the Court of King's Bench is to the effect of those cases, *as reported*. *Telford v. Thomas*. 319
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### INTESTACY.

Succession to intestates' effects dying domiciled elsewhere. *See DOMICIL*. 1

### IRISH MARRIAGE.

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### JURISDICTION.

*See BRAWLING*, 2.—*REQUEST*.—*COSTS*, 2.

1. A question of jurisdiction ought not to be raised on a mere motion. 321
2. The spiritual Court is neither indebted for its jurisdiction over inventories to the statute 21 Hen. VIII., c. 5; nor is its jurisdiction in that matter at all infringed by that statute. 324, 329

### LACHES.

One who prays an extraordinary indulgence must not have been reduced to the necessity of so doing by his own *laches*. *Durant v. Durant*. 267

### MARRIAGE.

*Quare*, whether a party can allege, successfully, in excuse for laches, the illness (or as the case may be) of his *attorney*. The spiritual Court knows nothing of *attornies*. The proctor is "*dominus litis*;" and he, and his principal are alone responsible to the Court and the other party. *Ibid*. 270, 273

### LUCID INTERVAL.

*See DELIRIUM*.

### LUNACY.

Of executor or administrator, *see ADMINISTRATION*, 2, 3.—*WRIT de lunatico inquirendo*. 35, 110

### MARRIAGE.

*See BIGAMY*.—*DECREE TO see PROCEEDINGS*.—*MARRIAGE CERTIFICATE*.—*NULLITY*.—*REVOCATION*.

1. A valid marriage between parties may be had by their consent *per verba de presenti in Scotland*, such parties being, respectively, above the age of pupillage, without either banns or license, and without the intervention of any religious ceremony. Also—the public cohabitation of parties as husband and wife in Scotland is *presumptive* proof that they are validly married; and becomes *conclusive* evidence of such their marriage in the event of its not being distinctly proved that "they did not intend" to contract matrimony. *Montague v. Montague*. 375
  2. A marriage in Ireland, in a private house at any hour of the day or night, is valid, if celebrated by a person in holy orders, between two *papists*, according to some catholic ritual. *Bruce v. Burke*. 471.
- A marriage so celebrated between two parties alleged to be null by

reason that one of the said two parties was a protestant—that alleged ground of nullity held not to be proved. *Ibid.*

MARRIAGE AND BIRTH OF ISSUE.

*See* REVOCATION.

MARRIAGE CERTIFICATE.

1. The certificate of registry is not essential to the proof of a marriage—especially not to the proof of a marriage had, if at all anterior to the marriage act. *Northey v. Cock.* 294, 296, n.
2. A certificate (so purporting to be) of a Gretna Green marriage is not pleadable in proof of that marriage. *Nokes v. Milward.* 390, 394. But though not pleadable *quâ* certificate, it may be as a constituent, wholly or in part, of the marriage; accompanied by averments, to be sustained by evidence, of its being such, in and by the law of Scotland. *Montague v. Montague.* 375

MINOR.

*See* PROCESS.

NOTICE OF VESTRY.

*See* BRAWLING, 1.—VESTRY.

NULLITY OF MARRIAGE.

*See* BIGAMY, 2.

In a cause of nullity of marriage, *the* marriage, of the nullity of which a declaratory sentence is prayed, requires, *especially*, to be proved—in which part of his case if the plaintiff fails, the Court should withhold its declaratory sentence of nullity—how clearly soever all the several facts may be established in evidence, on which, had

the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded. This at least is the rule, where the plaintiff and defendant, respectively, are the alleged contracting parties. *Nokes v. Milward.* 386

The hypothetical form of the sentence in certain causes of nullity of marriage, [*viz.* a sentence pronouncing the marriage null, *if any such marriage were had*] to be accounted for by the special consideration, that the plaintiff, in each of those causes, was not only neither party, nor privy, to the marriage, but was one, from whom the particulars of the marriage were, probably, studiously concealed by the defendant, in order, expressly, to defeat the object of the suit. *Heseltine v. Murray.* *Fust v. Bowerman.* *Watson v. Faremouth.* 399, 402

PAPERS IMPERFECT.

*See* IMPERFECT PAPERS.

PECULIARS.

Appeals and letters of request from peculiars lie at once, to the metropolitan. 406

PEREMPTION OF RIGHT TO APPEAL.

*See* APPEAL, 1, 2.

PERSONAL ANSWERS.

*See* ANSWERS.

PEWS.

1. Faculties appropriating pews in parish churches, to particular families, in different forms, and under different limitations, too lavish-

ly granted by ordinaries in former times—the numerous exclusive rights to particular pews vested, *or supposed to be vested*, in particular families, to which this has given rise, nuisances to parishes at large—it is the duty of ordinaries to prevent, so far as may be, their continuance or increase by treating all applications for such faculties with great reserve; and by suffering none to issue but on special considerations. *Fuller v. Lane.* 419

General law with respect to pews and sittings in churches, 425. Duties of churchwardens in respect to ditto, 426. Divers forms, and sundry limitations, in and under which faculties appropriating pews have issued, 426, 427. and which the least exceptionable. *Ibid.*

- 2 Prescriptive rights to pews, origin of—what the parties claiming them must shew in order to make out their prescriptive titles, 427.

### PLEADINGS.

1. In a rejoinder to, or upon, a responsive allegation, the only facts strictly pleadable are those, either contradictory to, or explanatory of, facts pleaded in the allegation to, or upon, which it rejoins; and those which are *noviter perventa* to the proponent's knowledge—though the Court *may*, in its discretion, permit facts to be pleaded which come under none of those descriptions, under certain circumstances. *Dew v. Clark and Clark.* 102
2. In *criminal* proceedings the defendant is entitled to a full latitude of defence; and to plead all matters which can, *in any degree*,

### PRACTICE.

bear on the ultimate decision of the cause. *Gates v. Chambers.* 188

3. A party, on appeal, may amend his case by pleading *new facts* in the *appellate* Court. 289, 403
4. The principle upon which the Court *rejects* any plea is, its inadequacy, assuming it to be true, to make out the case laid in it. *Montefiore v. Montefiore.* 354
5. In assuming an allegation to be true for the purpose of determining its admissibility, the Court only assumes to be true, those facts pleaded in it capable of satisfactory proof; and not all the several averments which may stand in the allegation, being mere inferences deduced, *somehow*, from those facts. The averments in a plea, are taken for true, only *so far*, as the facts pleaded, justify inferences to the effect of those averments; which whether they do at all, and if so, to what extent, it is for the Court to determine. *Ibid.* 355, 356.

6. In considering whether a plea propounding a testamentary paper be admissible, the Court is bound to keep in view the extent, and effect, of the paper: and to couple these, *all along*, with its history as given in the plea. *Ibid.* 361

### POOR.

The poor how entitled to due accommodation in their parish churches, and why in particular, 429, 430, *et seq.* This how lately, especially, provided for. *Ibid.*

### PRACTICE.

See ADMINISTRATION, 1, 2, &c. — ALIMONY, 3. — CODICIL, 3. — APPEAL, 3. — Decree to see PROCEEDINGS. — DOMICIL, 2. — EVIDENCE, 6. — FEME COVERT. — PROCESS. — WILL, 5.

1. An original codicil of which probate had been granted delivered out in order to its being registered in Scotland, and there finally deposited—this being necessary to give effect to the same; and the codicil itself not relating to any property of the testator in this country. *Re. Nicholson*, deceased. 333
2. The Court, if prayed will direct its officer to attend with the papers in a cause *depending*, at the trial of an indictment, preferred by one of the two litigant parties, against certain witnesses examined on behalf of the other, for a conspiracy to sustain, by false oaths, the case of that other. *Westmeath v. Westmeath*. 380
3. A party who has once prayed publication, though stopped by an asserted allegation, is not at liberty to produce further witnesses upon his plea, as a matter of course—that is, not without special ground laid, and by leave of the Court; in the event of such asserted allegation not being actually filed. *Bruce v. Burke*. 404

## PROCESS.

See ADMINISTRATION, 9.

Decree to see PROCEEDINGS.

In all cases of "process" served on a minor, the Court requires a certificate of its having been served in the presence of the natural, or legal guardian of the minor: or, at least, in that of some person or persons, upon whom the actual care and custody of the minor for the time being, has properly devolved. *Cooper v. Green*. 454

## PROHIBITIONS

*Quare*, whether prohibitions to the spiritual Court should go, at least, in certain cases, till civilians have been heard *contra*. 323 *et seq.*  
 Prohibition to suit for brawling, by letters of request. 137  
 Prohibition *nisi* to suit against a clerk for incontinence, after eight months expired, on 27 G. 3, c. 44. 418, n.

## PROCTOR.

See LACHES,

Proctor dominus *litis*. 272

## PROTEST.

To inhibition. [See APPEAL, 1.] *Greg v. Greg*. 276  
 To citation by letters of request. [See REQUEST, 2.] *Burgoyne v. Free*. 405

## REDUNDANT ANSWERS.

See ANSWERS.

## REJOINDER.

See PLEADINGS, 1,

## REPUBLICATION.

See CODICIL, 4.

## REQUEST.

1. A suit for brawling may be by "letters of request." *Dave v. Williams*. 130
2. "Letters of request" from a bishop's "commissary," go in the same course with the "appeal;" that is, not to the diocesan Court, but to the metropolitical—the Court of Arches. *Burgoyne v. Free*. 405

## 622 RESTITUTION OF CON- JUGAL RIGHTS,

### RESCINDING CONCLUSION OF CAUSE, &c.

1. A prayer to rescind the conclusion of a cause, &c., rejected for reasons especially stated. *Robson v. Locke*, 95 *et seq.* *Nokes v. Milward*. 402
2. When the Court is prayed to rescind the conclusion of a cause, in order to new matter being pleaded, it always requires to be satisfied, both that the party praying it is in no *laches*, and that the measure prayed is one essential to the ends of justice—it always further requires that some *special* ground be laid (as that of such new matter having *newly come* to the proponent's knowledge, or as the case may be) to found the prayer. *Durant v. Durant*. 267

## RESTITUTION OF CONJUGAL RIGHTS.

See ADULTERY, 2.

1. An allegation responsive to the libel, in a suit for restitution of conjugal rights admitted to proof; although the facts pleaded amounted to a charge neither of cruelty or adultery against the party by whom a sentence of restitution was prayed—but without the Court pledging itself as to the final effect of the facts pleaded, at the hearing. *Molony v. Molony*. 253
2. The Ecclesiastical Court can only interfere in the way of *restitution*, where matrimonial *cohabitation* is suspended. Hence it is incompetent to the wife to sue the husband; or the husband, the wife, for *restitution*, pending cohabitation. *Orme v. Orme*. 382
3. But when a husband, who has

## REVOCATION.

been sued successfully for restitution, *certifies* (as usual) in order to his *dismissal*, that he "has taken his wife home, and treated her with conjugal affection;" (both of which he is enjoined, such being the *usual* form of sentence) the wife may be heard in objection to such certificate—and on proof that though she has been "*taken home*," the husband, *at home*, has *not* treated her with "conjugal affection," the Court will refuse to dismiss the husband, but direct him to certify over. *Gill v. Gill*. 384

## REVIVAL.

To the revival of a former uncanceled will, upon the cancellation of a latter revocatory will, the legal presumption is neither adverse nor favourable—in other words, there is *no* legal presumption, either way. The law, having furnished that principle, retires; and leaves the question one of intention merely, and open to a decision, either way, according to extrinsic facts and circumstances. *Usticke v. Bowden*. 116

A case of this description *totally* nude of circumstances, is so, next to, impossible, as to render it unnecessary to enquire what principle would be applicable to it, should it ever occur. *Ibid*. 126

## REVOCATION.

See—CANCELLATION.—REVIVAL.

1. A will and codicil pronounced for; and three *intermediate* codicils held to be, *impliedly* revoked. *Greenough v. Martin*. 239
2. A will is presumptively revoked by the testator marrying and hav-

## STATUTES.

ing issue. That presumption however, (the strength of which varies according to circumstances) may be rebutted by evidence (strong in proportion) to shew that the testator meant it to operate notwithstanding his having married and had issue: but such evidence, to be effectual, must satisfy the Court as to this, *unequivocally*. A formal codicil, *subsequent*, referring in direct terms to that identical will would, undoubtedly, as a republication of the will, be effectual to this. *Gibbens v. Cross*. 455

## SCOTCH MARRIAGE.

See MARRIAGE, 1.—MARRIAGE CERTIFICATE, 2.

## SEATS IN A CHURCH.

See PEWS.

## SECURITIES.

See ADMINISTRATION, 5, 8.

## SEPARATION (DEEDS OF.)

See ADULTERY, 3.

Deeds of separation are no bars, either, on the one hand, to suits for restitution; or, on the other, to charges of adultery. Provisions of one, held not, as insisted, to amount to a letter of licence to the wife to commit adultery. *Sullivan v. Sullivan*. 303

## STATUTES.

21 Hen. 8, c. 5, pp. 322, 324, 329,—  
23 Hen. 8, c. 9, pp. 136, 409, 411.  
—24 Hen. 8, c. 12, pp. 407, 408,  
—5 & 6 Edw. 6, c. 4, pp. 137,  
141.—22 Car. 2, pp. 255, 258.—  
12 Geo. 3, c. 11, p. 400, n.—27  
Geo. 3, c. 44, pp. 415, 417, 418.

## VERDICT.

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—38 Geo. 3, c. 87, p. 504.—57  
Geo. 3, c. 99, pp. 180, 195.—58  
Geo. 3, c. 69, pp. 135, 139.

## STOCK.

Liability of, to church rate, *see*  
CHURCH RATE.

## TRUSTEES.

See ADMINISTRATION, 4.

## TRUTH OF PLEAS.

How far assumed by Courts in considering their admissibility, *see*  
PLEADINGS, 5.

## VERDICT.

See BIGAMY.

1. A verdict *in pari materia*, between the same parties, pleadable. *Dew v. Clark*. 111, 113
2. A verdict of conviction is not *conclusive* evidence to the commission of the offence by the party against whom it is pleaded, in a mere civil cause: though it is in a personal (*partly* criminal) suit, founded, *immediately*, upon that offence of which the defendant (the party *proceeded against*, and against whom it is pleaded) has so been convicted. *Wilkinson v. Gordon*, 158, *et seq.* *Bromley v. Bromley*. *Ellenthorp v. Myers and Moss*. 158, 159, n.
3. A party in a cause may, *during its pendency*, indict certain witnesses examined on behalf of the other party, for a *conspiracy* to sustain, by false oaths, the case of that other: and, upon their conviction ensuing, may plead, this in exception to the testimony of such witnesses. *Westmeath v. Westmeath*. 380

## VESTRY.

See BRAWLING.

*Quære*, whether the gross abuse of a minister, while presiding at a meeting of his parishioners, in vestry, be not an ecclesiastical offence, and punishable, *as such*, by the general ecclesiastical law; although it be not liable to be dealt with as a "chiding and brawling" within the statute 5 & 6 Edw. 6, c. 4, inasmuch as the vestry was clearly not holden in a consecrated place. *Williams v. Goodyer*. 463

## VESTRY (NOTICE OF).

See BRAWLING.

[Statute 58 Geo. 3, c. 69, as to notice of vestry]. See pp. 135, 139

## UNEXECUTED WILL.

See IMPERFECT PAPERS.

A testator made a will to please his wife: then a second (unknown to his wife) to please himself: sometime after he went to his attorney and gave him *instructions* for a new or third will—telling him, at the same time, that he was going, *that day*, to make a codicil to (and so, in effect, to revive) the *first*, terming it his wife's, will; but would come, *the next day*, and execute the *third*, which he meant to be *his*, will. He revived the *first* will, accordingly; but died without *executing* the *third*. The Court holding that, upon the evidence, he was *only* prevented from executing the third by the "act of God" in the true sense of that phrase, pronounced for a *draft* will; which had been prepared, in his life time, from the *instructions* so given by the testator, as aforesaid.

## WILL.

## UNNATURAL PRACTICES.

1. Divorce, by reason of. *Bromley v. Bromley*, 158, n. *Mogg v. Mogg*. 292.
2. Deprivation, by reason of. *Ellenthorp v. Myers and Moss*. 159, n.

## WIFE.

See FEME COVERT.

## WILL.

See DOMICIL, 1, 2.

1. The will of a British-born subject (*sub modo*) domiciled abroad, if made in English, according to English forms, is, *probably*, entitled to probate *here*; though null and void according to the *lex loci* where it was made. *Duchess of Kingston's will—case of*. 21
2. A will propounded—the direct evidence of the *factum* of that will stated, and held to be sufficient, corroborated by various facts and circumstances, to entitle it to probate, if not itself impugned and discredited in the strongest manner—attempts to impugn it by attacking—first, the credit of the (sole) witness—secondly, the probability of the disposition—thirdly, the genuineness of the signature, stated, and held to fail—the will pronounced for; and the opposing parties condemned in costs. *Robson v. Rocke*. 53 *et seq.*
3. Direct evidence to the *factum* of a will propounded, stated, and held to be sufficient to sustain the paper. *Ayrey v. Hill*. 214 *et seq.*
4. An allegation propounding an imperfect paper as a will, rejected, as insufficient to sustain the paper. *Montefiore v. Montefiore*. 354



5. Administration, under certain limitations, of the goods of a foreigner, decreed to the substituted attorney of his residuary legatees, with an official copy annexed of "*extracts*" (only) "*from his will*"—such extracts consisting of the beginning and ending of the will; and of two clauses therein—the one containing the appointment of executors; and the

other, a bequest of the testator's (only) property in this country.  
*Re Rioboo, deceased.* 461

## WITNESS.

See APPEALS, 2.—ATTESTATION,—  
 ATTESTING WITNESSES, — EVIDENCE, 1, 2, &c.—EXCEPTIVE ALLEGATION, 2, 3, 4.—HANDWRITING.—PRACTICE, 2, 3.—VERDICT, 3.

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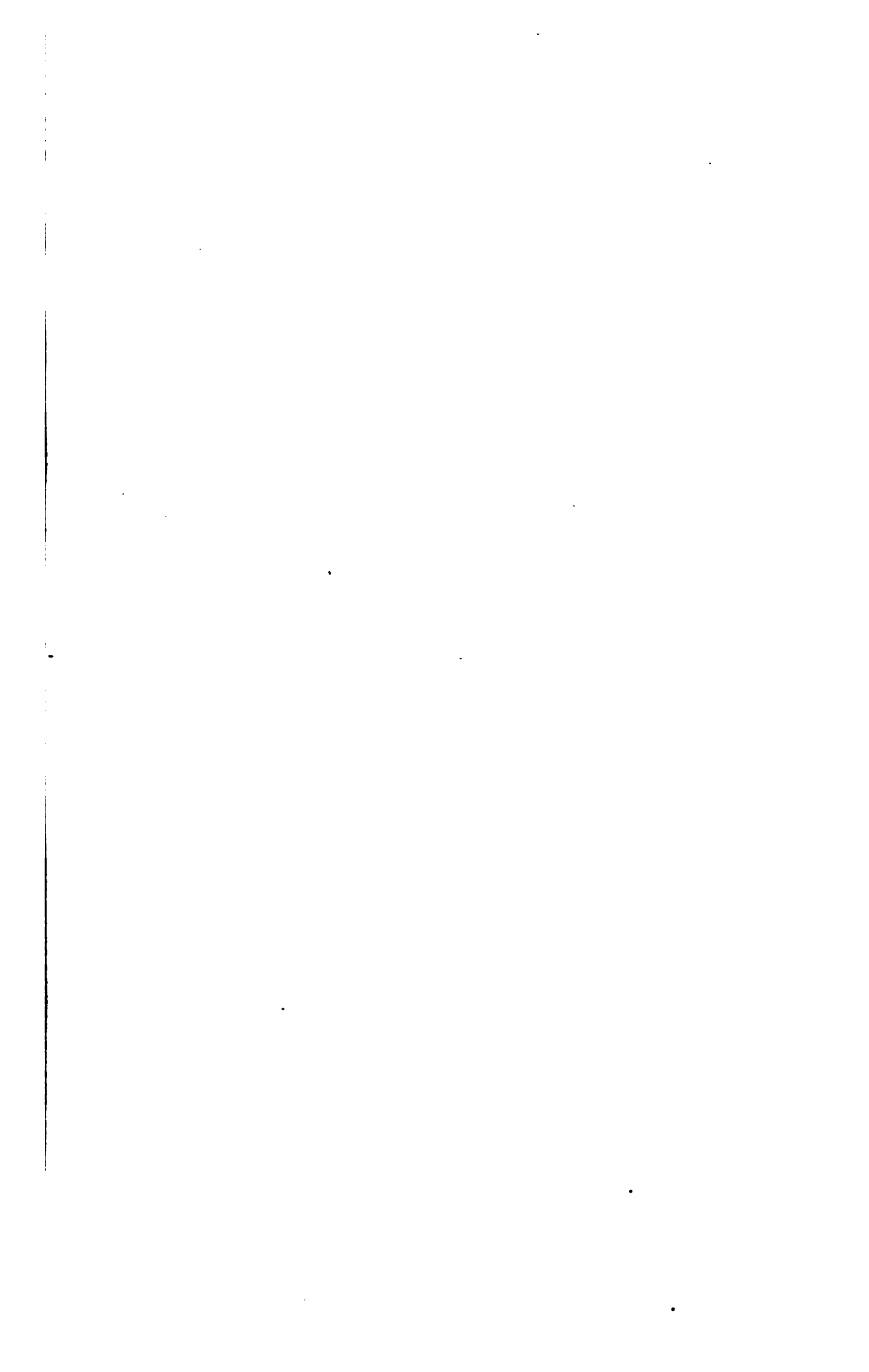
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#### ERRATA.

- Page 14, line 18, for "other his domicil," read "other *than* his domicil."  
25, in margin, for "differ," read "defer."  
165, line 6, for "as stands," read "as *it* stands."  
167, line 13, for "to *pro.* evidence," read "to *procure* evidence."  
316, for "Dr. Swaby," read "Dr. Swabey."









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